No. 79-408

Supreme Court, U. S.
FILED
OCT 22 1980
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF ILLINOIS

TYRONE C. FAHNER
Attorney General
State of Illinois

JOSEPH V. KARAGANIS
SANFORD R. GAIL
Special Assistant
Attorneys General
150 N. Wacker Drive
Chicago, Illinois 60606
(312) 782-1905

Of Counsel:
A. BRUCE WHITE
RUSSELL R. EGGERT
JEFFREY T. RENZ
150 N. Wacker Drive
Chicago, Illinois 60606
(312) 782-1905

Pandick Press Midwest, Inc., Chicago • 454-7600

QUESTIONS PRESENTED FOR REVIEW

1. Under Article III of the Constitution and the Judicial Code, what are the constitutionally proper forums when a State seeks to prevent injuries to its citizens from the tortious acts of a citizen of another State? Can a complaining State be constitutionally compelled to seek relief in either the state courts or the state administrative agencies of a defendant citizen?

2. Where the separate and independent grounds for relief were asserted in the District Court—one based on federal common law, one based on an Illinois state statute and one based on state common law—was not the District Court correct in applying federal law to the federal common law claim and state law to the state statutory and state common law claims? Under *Erie* v. *Tompkins,* 304 U.S. 64 (1938) and *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945), is not this Court constitutionally compelled to apply state statutory and common law to these claims having their source in state law?

3. Where a federal court fashions "interstitial" federal common law to implement the general goals of a Congressionally established statutory program, does the federal court have constitutional authority to oust (preempt) concurrent state statutory and common law remedies where the Congress has expressly declared its intent to preserve state common law and state statutory remedies?

4. In the enactment of the 1972 Amendments to the Federal Water Pollution Control Act (P.L. 92-500) and the 1977 Amendments to the same Act (P. L. 95-217) did Congress intend to oust state statutory and common law remedies from operation or did Congress intend to preserve the concurrent operation of those state statutory and common law remedies?

5. Where Congress has been repeatedly informed through the pronouncements of this Court, *e.g., Vermont* v. *New York,* 417 U.S. 270, 275 n. 5 (1974), and the express holdings of the

lower courts that the federal interstitial common law announced by this Court in *Illinois* v. *Milwaukee,* 406 U.S. 91 (1972) and *Washington* v. *General Motors Corp.,* 406 U.S. 109 (1972) has not been preempted by either the Clean Air Act or the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500) and Congress has not changed the law, can Congress be held to have ousted interstitial federal common law from the fields of air and water pollution control?

6. Has a violation by Milwaukee of Illinois' rights under the Illinois Environmental Protection Act, state common law and federal common law been established where both the District Court and the Court of Appeals found—after an exhaustive review of the evidence—and on the basis of uncontested evidence that:

a. It is undisputed that Milwaukee discharges huge volumes of raw or inadequately treated sewage into Lake Michigan containing billions of disease-causing virus and bacteria on a frequent basis. This information is based on both undisputed general scientific knowledge about the content of human feces as well as voluminous sample data for fecal bacteria.

b. It is undisputed that these pathogens are carried by shore parallel currents into Illinois waters of Lake Michigan on a periodic basis. There was no dispute among all parties' experts that such transport does take place and that the time of travel can be as little as two days. The only dispute among experts was as to the frequency of such transport and all agreed the frequency could vary from year to year. All of the expert testimony was based on massive amounts of data collected from Lake Michigan as to current, speed, persistence, and direction, as well as data on dispersion.

c. It is undisputed that bacterial pathogens survive as long as four days to eight days and that viruses survive at temperatures found in Lake Michigan for several weeks to months.

d. It is undisputed and two courts found that Milwaukee viruses and pathogenic bacteria in Illinois water create a serious health hazard for swimmers and that

viruses can survive the treatment processes at drinking water plants thus creating a severe health hazard.

e. It is undisputed that large numbers of people in Illinois and in Wisconsin are being infected with enteric viral disease, but for a variety of reasons—including the fact that for every 100 persons infected only one will exhibit evidence of a disease—it is impossible to develop an epidemiological link between the source of contamination and the infected victim.

f. It is undisputed that there are bacterial counts on northern Illinois beaches which are clearly of human origin, but that it is impossible to identify the discharge source of this bacteria. Bacteria in open waters of Lake Michigan (a) are invisible to the naked eye and (b) do not carry certificates of origin.

7. Has a violation by Milwaukee of Illinois' rights under the Illinois Environmental Protection Act, state common law, and federal common law been established when both the District Court and the Court of Appeals found—after an exhaustive review of the evidence—that:

a. Phosphorus is the primary chemical ingredient which accelerates the aging or "eutrophication" of Lake Michigan, changing it from a clear fresh body of water into a lake clogged with algae;

b. Milwaukee's antiquated sewage treatment plants discharge over 50% of the total sewage load of phosphorus into *all* of Lake Michigan, with Milwaukee's raw sewage overflows adding an untold additional amount;

c. Lake Michigan is becoming increasingly eutrophic;

d. The phosphorus and other nutrients as well as the algae they produce travel throughout the nearshore zone without regard to invisible state borders;

e. It is uncontested that communities along the north shore of Illinois experience increasing algal taste and odor problems with drinking water drawn from Lake Michigan;

f. It is uncontested that if left unchecked this eutrophication process will harm fish spawning areas.

8. After 13 years of interminable administrative and judicial delay—exacerbated in great part by Milwaukee's constant and repeated maneuvers to avoid a judicial determination of liability and the imposition of an effective judicial remedy—and after detailed determination of both liability issues and the remedy issues by both the District Court and the Court of Appeals, can Milwaukee create further delay by invoking the same tired arguments of which this Court rejected ten years ago where:

a. The permit system cited by Milwaukee is administered by a Wisconsin state agency. Illinois cannot be constitutionally compelled to try its complaints in the state courts or agencies of the defendant;

b. By their own terms the Wisconsin permits provide the same basic relief as contained in the Amended Judgment Order, but have no legal effect because the permits are limited to five years and the relief requested here will take a minimum of 13 years. The permits contain no deadlines for achievement of any effluent controls on any overflows even though the permits—like the Amended Judgment Order here—call for *elimtnation* of the overflows in the separated area which comprise 95% of the sewer collection area;

c. The state permits expressly disclaim any legal connection with the eleventh hour consent decree between Wisconsin administrative officials and Milwaukee entered into on the eve of the federal court's decision here;

d. The eleventh hour consent stipulation between Milwaukee and Wisconsin officials is enforceable only in Wisconsin courts and is subject to consensual changes between Milwaukee and Wisconsin officials at any time;

e. The eleventh hour consent decree is so open-ended that the deadline for completion of the combined sewer area corrective measures—which are as yet undefined three years after the consent stipulation was entered—may never be completed, and at the very least, may not be completed until the year 2025.

9. Will this Court be deceived by Milwaukee's and the *amici* sewage agencies' audacious attempt to obtain a judicial amendment to the Clean Water Act giving judicial approval of

"cost-effective" water quality standard violations where the Congress has dictated a completely different definition of "cost-effective" under § 212 and 40 C. F. R. Part 35, Subpart E, Appendix A, ¶ 4b—i.e., the least cost method necessary to achieve water quality standards through § 301(b)(1)(C); and where Milwaukee has been unsuccessful in selling its argument to Congress?

10. Where Milwaukee consciously and intentionally discharges hundreds of millions of gallons of raw and inadequately treated sewage into Lake Michigan every year, and where this sewage is carried with Milwaukee's knowledge into Illinois waters on a regular basis, endangering Illinois' beaches and water supply:

a. Does a federal District Court in Illinois have *in personam* jurisdiction?

b. Was venue proper in the District where the injury occurred?

TABLE OF CONTENTS

	Page
Questions Presented For Review.	i
Table Of Contents.	vi
Table Of Authorities.	x
Statutory Provisions Involved.	xvi
Statement Of The Case.	1
A. Illinois' Efforts To Abate Pollution Of Lake Michigan.	6
1. The Lake Diversion Studies And The *Maris* Report.	6
2. Illinois' Precarious Position.	8
3. The Effort At Administrative Abatement Through The Federal Water Pollution Control Act.	8
4. Illinois Seeks Judicial Abatement.	9
B. *Illinois* v. *Milwaukee* In The Supreme Court Round One	12
C. The Procedural History Of This Case.	13
1. The Complaint.	13
2. Milwaukee's Pre-Trial Maneuvers.	13
3. The Evidence At Trial.	15
4. The Judgment Of The District Court on Liability	16
5. The Remedy Ordered By The District Court.	17
a. Collection.	17
i. The Separated Sewer Area.	17
ii. Combined Sewer Area (CSO)	18
b. Treatment.	19
6. The Decision Of The Court of Appeals.	20
Summary Of Argument.	20
A. Legal And Constitutional Framework For Illinois' Claims.	20
B. The Evidence To Support The Decision Of Liability.	22

C. Milwaukee's Arguments 22
1. Compliance With Wisconsin Abatement Orders 22
2. Cost-Effectiveness 23
3. *In Personam* Jurisdiction 24
4. Venue 25
Argument 26
I. Under The Constitution Illinois Cannot Be Compelled To Litigate Its Claim Against Milwaukee In The State Courts Of Wisconsin 26
A. This Is A Suit By A State Against A Citizen Of Another State 26
B. This Is Not A Suit By A State Against Another State 28
C. This Court's Dilemma Really Centers On The Search For An Alternative Forum 28
II. Choice Of Law—Under The Constitution The Law To Be Applied In Determining Claims Of Substantive Right Is The Law Which Is The Source Of The Substantive Right 30
III. Judicial Declaration Of A Federal Common Law Right As An Interstitial Remedy To Effectuate A Congressional Purpose Cannot Oust State Legislatures And Courts Of Their Law-Making Power Unless Congress Clearly Intends State Law To Be Ousted 32
A. The Source Of The Federal Common Law Of Nuisance Articulated By This Court Was "Interstitial" Federal Common Law 32
B. Federal Interstitial Common Law Cannot Oust Concurrent State Statutory And State Common Law Unless The Statutory Scheme On Which The Interstitial Federal Common Law Is Based Demonstrates A Clear Intent To Oust State Law 34
C. The Constitutional Mandate of *Erie* That State Law Govern The Determination Of Rights With Their Source In State Law Is Consistent With The Court's Decision In *Illinois* v. *Milwaukee* 35

D. The Law Applied In Suits By One State Against Another State Does Not Apply To Interstitial Federal Common Law. 38
E. Congress Has Not Preempted State Statutory And Common Law Remedies To Abate Water Pollution. 39
1. The Law Of Preemption. 39
2. Congressional Intent To Preserve State Law. 39
F. Congress Was Aware Of Court Decisions That The 1972 FWPCA Amendments Had Not Preempted *Federal* Common Law. With This Knowledge It Rejected Attempts To Preempt Both The Federal Common Law And The Result In This Case. 42
IV. The District Court Properly Held That Federal Law Governs The Federal Common Law Claim In Count I And That State Law Governs The State Statutory And State Common Law Claims In Counts II and III. 45
V. The Evidence Before The Trial Court Below Overwhelmingly Demonstrates Milwaukee's Liability For Contaminating Illinois Waters Of Lake Michigan Under The Federal Common Law, The State Common Law, And The Illinois Environmental Protection Act. 46
VI. Wisconsin's Abatement Requirements Continue To Be Plagued By Lack Of Specific Commitments And Lack Of Precise Deadlines. 47
A. Wisconsin's Pollution Control Requirements .. 48
B. Wisconsin Permits Are Not A Defense. 52
C. Illinois Permit Requirements Are As Strict As The Judgment Order 53
VII. "Cost-Effectiveness" As Used In The Clean Water Act Means The Least Resource Cost To Achieve The Requirements Of The Act: "Cost-Effectiveness" Does Not Allow Milwaukee To Violate Water Quality Standards Under § 301(b)(1)(C) And § 303(c). 53
VIII. The Cost To Milwaukee Was Considered By The Courts Below Even Though The Doctrine Of Balancing Does Not Apply When A Public Health Nuisance Is Involved. 56

IX. The District Court Had *In Personam* Jurisdiction, And Venue Was Proper In The Northern District Of Illinois. 58

A. The District Court Had *In Personam* Jurisdiction. 58

1. Discharge Of Pathogens Into Illinois Waters Constitutes The Commission Of "A Tortious Act Within" The State Of Illinois. 59

2. The Contacts Between Illinois And Milwaukee Are Sufficient To Support *In Personam* Jurisdiction 60

B. Venue Was Proper In The Northern District Of Illinois. 62

1. Illinois' Claims Are "Transitory" Actions. 63

2. Section 505 Of The Clean Water Act Is Inapplicable. 65

3. Illinois' Claim "Arose" In The Northern District of Illinois. 66

Conclusion 67

TABLE OF AUTHORITIES

Cases

Alexander v. *Tolleston Club*, 110 Ill. 65 (1884) 11

Berenyi v. *District Director, Immigration & Naturalization Service*, 385 U.S. 630 (1967) 22, 46

Bethlehem Steel Corp. v. *Train*, 538 F.2d 513 (2d Cir. 1976) 51

Board of Commissioners of Jackson County v. *United States*, 308 U.S. 343 (1939) 33, 34, 36, 37-38

Board of Commissioners of Ohio County v. *Elm Grove Mining Co.*, 9 S.E. 2d 813 (W. Va. 1940) 57

Board of Supervisors of Fairfax County, Virginia v. *United States*, 408 F. Supp. 556 (E. D. Va. 1976) 43

Borden Farm Products v. *Baldwin*, 239 U.S. 194 (1934) 19-20

Casey v. *Adams*, 102 U.S. 66 (1880) 65

Chisholm v. *Georgia*, 2 Dall. 419 (1793) 21, 27

City of Evansville v. *Kentucky Liquid Recycling, Inc.*, 604 F.2d 1008 (7th Cir. 1979) 66

City of Harrisonville v. *W. S. Dickey Clay Manufacturing Co.*, 289 U.S. 334 (1932) 57

Clearfield Trust Co. v. *United States*, 318 U.S. 363 (1943). 33

Commonwealth ex rel. Schumaker v. *New York & Pa. Co.*, 367 Pa. 40, 79 A.2d 439 (1951) 52, 57

Connecticut v. *Massachusetts*, 282 U.S. 660 (1931) 38

Consolidated Laboratories, Inc. v. *Shandon Scientific Co.*, 384 F.2d 797 (7th Cir. 1967) 60

Costas v. *City of Fond du Lac*, 24 Wis. 2d 409, 129 N.W. 2d 217 (1964) 52

Craft v. *I., D. & W., Ry. Co.*, 166 Ill. 580, 46 N.E. 1132 (1897) 11

Denver & Rio Grande Western Railroad Co. v. *Brotherhood of Railroad Trainmen*, 387 U.S. 556 (1967) 63

Deitrick v. *Greaney*, 309 U.S. 190 (1940) 33, 34, 37

D'Oench, Duhme & Co. v. *FDIC*, 315 U.S. 447 (1942) 33, 34, 37

Erie R. Co. v. *Tompkins*, 304 U.S. 64 (1938) ..... *passim*

Florida Lime & Avocado Growers, Inc. v. *Paul*, 373 U.S. 132 (1963) 40

Georgia v. *Tennessee Copper Co.*, 206 U.S. 230 (1907) 60
Germania Insurance Co. v. *Wisconsin*, 119 U.S. 473 (1886) 27
Graver Tank & Manufacturing Co. v. *Linde Air Products Co.*, 336 U.S. 271 (1949) 22, 46-47
Gray v. *American Radiator & Standard Sanitary Corp.*, 22 Ill. 2d 432, 176 N.E. 2d 761 (1961) 59, 60
Guaranty Trust Co. v. *York*, 326 U.S. 99 (1945) ..... i, 31, 37 38, 46, 67
Hanson v. *Denckla*, 357 U.S. 235 (1958) 62
Hinderlider v. *La Plata River & Cherry Creek Ditch Co.*, 304 U.S. 92 (1938) 39
Honeywell, Inc. v. *Metz Apparatewerke*, 509 F.2d 1137 (7th Cir. 1975) 60
Illinois v. *City of Milwaukee*, 599 F.2d 151 (7th Cir. 1979) *passim*
Illinois v. *City of Milwaukee*, 406 U.S. 91 (1972) ..... *passim*
Illinois v. *City of Milwaukee*, 366 F. Supp. 298 (N. D. Ill. 1973) 41, 43
International Shoe Co. v. *Washington*, 326 U.S. 310 (1945) 60
Kansas v. *Colorado*, 206 U.S. 46 (1907) 38
Kulko v. *Superior Court*, 436 U.S. 84 (1978) 62
Ladew v. *Tennessee Copper Co.*, 218 U.S. 357 (1910) 64
Landfill, Inc. v. *Pollution Control Board*, 74 Ill. 2d 541, 387 N.E. 2d 258 (1978) 52
Leroy v. *Great Western United Corp.*, ____ U.S. ____, 99 S.Ct. 2710 (1979) 63, 66-67
Livingston v. *Jefferson*, 15 Fed. Cases 660 (No. 8411) (C.C.D. Va. 1811) 64
Local 174, Teamsters v. *Lucas Flour Co.*, 369 U.S. 95 (1962) 34
McBreen v. *Beech Aircraft Corp.*, 543 F.2d 26 (7th Cir. 1976) 60
McGee v. *International Life Insurance Co.*, 355 U.S. 220 (1957) 62
Markham v. *City of Newport News, Va.*, 184 F. Supp. 659 (E.D. Va. 1960), *rev'd*, 292 F.2d 711 (4th Cir. 1961) 63
Maternally Yours, Inc. v. *Your Maternity Shop, Inc.*, 234 F.2d 538 (2d Cir. 1956) 31

Metropolitan Sanitary District v. *United States Steel Corp.*, 30 Ill. App. 3d 360, 332 N.E. 2d 426 (1975), *cert. denied*, 424 U.S. 976 (1976) 11, 41

Mianus River Preservation Committee v. *E.P.A.*, 541 F.2d 899 (2d Cir. 1976) 41

Miree v. *DeKalb County, Georgia*, 433 U.S. 25 (1977) 35

Mississippi & Missouri Railroad Co. v. *Ward*, 67 U.S. (2 Black) 485 (1863) 64

Missouri v. *Illinois*, 200 U.S. 496 (1906) 47

Nelson v. *Miller*, 11 Ill.2d 378, 143 N.E.2d 673 (1957) 59

New Jersey v. *City of New York*, 283 U.S. 473 (1931), *decree mod.*, 290 U.S. 237 (1933) 52

New York v. *New Jersey*, 256 U.S. 296 (1921) 47

New York State Department of Social Services v. *Dublino*, 413 U.S. 405 (1973) 40

Ohio v. *BASF Wyandotte*, 2 ELR 20338 (N.D. Ohio 1972) 11

Ohio v. *Wyandotte Chemicals Corp.*, 401 U.S. 493 (1971) .. *passim*

Parks Co. v. *City of Decatur*, 138 F. 550 (6th Cir. 1905) 63

Pennoyer v. *Neff*, 95 U.S. 714 (1878) 29, 60

People v. *City of Port Huron*, 305 Mich. 153, 9 N.W.2d 41 (1943) 57

People v. *Republic Steel* (South Chicago Works), No. 69 CH 3675 (Ill. Cir. Ct.) 10-11

People v. *United States Steel Corp.* (South Chicago Works), No. 69 CH 3334 (Ill. Cir. Ct.) 10

People v. *United States Steel Corp.* (Waukegan), 72 C 2503 (U.S.D.Ct., N. D. Ill.) 11

People v. *United States Steel Corp.* (Gary), 72 CH 258 (Ill. Cir. Ct.) 11

People v. *Youngstown Sheet & Tube Co.*, 71 CH 3818 (Ill. Cir. Ct.) 11

People ex rel. Scott v. *United States Steel Corp.*, 40 Ill. App. 3d 607, 352 N.E.2d 225 (1976) 11, 41, 52

Plaquemines Tropical Fruit Co. v. *Henderson*, 170 U.S. 511 (1898) 27

Rice v. *Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) 39

The Salton Sea Cases (California Development Co. v. *New Liverpool Salt Co.)*, 172 F. 792 (9th Cir. 1909) 11

Shaffer v. *Heitner*, 433 U.S. 186 (1977) 60

State ex rel. Shevin v. *Tampa Electric Co.*, 291 So. 2d 45 (Fla. App. 1974) 52
Steel v. *Bulova Watch Co.*, 344 U.S. 280 (1952) 11
Stream Pollution Control Board v. *United States Steel Corp.*, 512 F.2d 1036 (7th Cir. 1975) 42, 52, 65
Textile Workers Union of America v. *Lincoln Mills*, 353 U.S. 448 (1957) 33-34, 35-36
United States v. *Ira S. Bushey & Sons, Inc.*, 363 F. Supp. 110 (D. Vt.), *aff'd.*, 487 F.2d 1393 (2d Cir. 1973), *cert. denied*, 417 U.S. 976 (1974) 43
United States v. *Ira S. Bushey & Sons, Inc.*, 346 F.Supp. 145 (D. Vt. 1972) 43
United States ex rel. Scott v. *United States Steel Corp.*, 356 F.Supp. 556 (N.D.Ill. 1973) 41, 43
United States Steel Corp. v. *Train*, 556 F.2d 822 (7th Cir. 1977) 41, 51
Venuto v. *Owens-Corning Fiberglas Corp.*, 22 Cal. App. 3d 116, 99 Cal. Rptr. 350 (1971) 52
Vermont v. *New York*, 417 U.S. 270 (1974) ..... i, 21
Village of Glencoe v. *Metropolitan Sanitary District*, 23 Ill.App.3d 868, 320 N.E.2d 524 (1974) 41
Wallis v. *Pan American Petroleum Corp.*, 384 U.S. 63 (1966) 35
Washington v. *General Motors Corp.*, 406 U.S. 109 (1972) ii, 21
White Star Mining Co. v. *Hultberg*, 220 Ill. 578, 77 N.E. 327 (1906). 11
Wisconsin v. *Illinois*, 388 U.S. 426 (1967) 6
Wisconsin v. *Illinois*, 289 U.S. 395 (1933) 57
Wisconsin v. *Illinois*, 281 U.S. 179 (1930) 58
Wisconsin v. *Pelican Insurance Co.*, 127 U.S. 265 (1888) .. 21, 27
World-Wide Volkswagen Corp. v. *Woodson*, ____ U.S. ____, 100 S. Ct. 559 (1980) 59, 61

Constitutional Provisions

U.S. Constitution, Art. III, § 2 ..... 21, 26, 29

Statutes

Judicial Code, as amended
28 U.S.C. § 1251(b) 26
28 U.S.C. § 1331 ..... 26, 67

28 U.S.C. § 1332 26
28 U.S.C. § 1391(b) 25, 62-63, 66
28 U.S.C. § 1652 31
Federal Water Pollution Control Act of 1956, P.L. 84-660, § 8(b) 9
Federal Water Pollution Control Act, 33 U.S.C. § 466 8
Federal Water Pollution Control Act Amendments of 1972, P. O. 92-500 ..... i, ii, 13, 14, 22, 40, 41, 42-45, 48
Clean Water Act of 1977, P. L. 95-217 ..... iv, 40, 41, 43
Clean Water Act, 33 U.S.C. § 1251 *et seq.*
§ 212, 33 U.S.C. § 1292 ..... v, 24, 54, 55
§ 301, 33 U.S.C. § 1311 54
§ 301(b)(1)(A), 33 U.S.C. § 1311(b)(1)(A) 48, 50
§ 301(b)(1)(B), 33 U.S.C. § 1311(b)(1)(B) 48, 50
§ 301(b)(1)(C), 33 U.S.C. § 1311(b)(1)(C) ..... v, 23-24, 48, 50, 51, 53, 54, 55, 56
§ 301(i), 33 U.S.C. § 1311(i) 53
§ 303, 33 U.S.C. § 1313 ..... 48, 54
§ 303(c), 33 U.S.C. § 1313(c) 23-24, 51, 53, 55, 56
§ 303(d), 33 U.S.C. § 1313(d) 23, 48, 50, 51, 55
§ 402(k), 33 U.S.C. § 1342(k) 52
§ 505, 33 U.S.C. § 1365 ..... 42, 44, 65
§ 505(c)(1), 33 U.S.C. § 1365(c)(1) 65
§ 505(e), 33 U.S.C. § 1365(e) 42, 45
§ 509, 33 U.S.C. § 1369 51
§ 510, 33 U.S.C. § 1370 ..... 40-41, 44, 45

Illinois Revised Statutes,
ch. 14, § 12 10
ch. 110, § 16 ..... 24, 58-59
ch. 110, § 17 ..... 24, 58-59
ch. 111½, § 1001 *et seq.* ..... iii, 10, 13, 17, 45, 61
ch. 111½, § 1012 10
Fed. R. Civ. P. 4(e) 24, 58

Regulations

40 C.F.R. Part 35, Subpart E, Appendix A, ¶ 4b [43 Fed. Reg. 44087 (September 27, 1978)] ..... v, 54
40 C.F.R. § 35.1550 [44 Fed. Reg. 30040 (May 23, 1979)] 54
Illinois Pollution Control Board Rule 602 53
Wisconsin Water Quality Standards, N.R. 102.02 49

Miscellaneous

Conference, *Pollution of Lake Michigan and Its Tributary Basin*, (First Session) (1968) 9
Conference, *In the Matter of Pollution of the Interstate Waters of the Grand Calumet River, Little Calumet River, Calumet River, Wolf Lake, Lake Michigan and Their Tributaries* (March 1965) 8
1 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972*, 93d Cong. 1st Sess. (1973) 41, 42
4 Congressional Research Service, *A Legislative History of the Clean Water Act of 1977*, 95th Cong. 2d Sess. (1978) 41-42
Currie, *Enforcement Under the Illinois Pollution Law*, 70 Nw. L. Rev. 389 (1975) 61
The Federalist No. 81 (A. Hamilton) (Cooke Ed. 1961) 27
General Accounting Office, *Many Water Quality Standard Violations May Not Be Significant Enough to Justify Costly Preventative Actions*, CED-80-86 (July 2, 1980)... 55
Hart, *The Relations Between State and Federal Law*, 54 Colum. L. Rev. 489 (1954) 39-40
Hart & Wechsler, *The Federal Courts and The Federal System* (2d Ed. 1973) 27

House Committee on Public Works and Transportation, *Case Law Under the Federal Water Pollution Control Act Amendments of 1972,* 95th Cong. 1st Sess. (1977) 43-44
E. Messer, *Jurisdiction of A Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State,* 14 Minn. L. Rev. 494 (1930) 11
Milwaukee Metropolitan Sewerage District, *Combined Sewer Facility Plan* (February 1980) 51, 56
Mishkin, *Some Further Last Words on Erie—The Thread,* 87 Harv. L. Rev. 1682 (1974) 35
Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. Pa. L. Rev. 797 (1957) 32-33
1 *Moore's Federal Practice,* ¶ 0.142[2.1] (2d Ed. 1979) 64, 65
Note, *Local Actions in the Federal Courts,* 70 Harv. L. Rev. 708 (1957) 63
Note, *The Original Jurisdiction of the United States Supreme Court,* 11 Stan. L. Rev. 665 (1959) 31
W. Prosser, *Law of Torts* (4th Ed. 1971) 60
Report of Special Master Albert Maris in *Wisconsin* v. *Illinois,* adopted 388 U.S. 426 (1967) 6-7
U.S.E.P.A., Program Requirements Memorandum, PRM 75-34 (formerly P. G-61) (1975) 55-56
Wright, Miller & Cooper 15 *Federal Practice & Procedure* § 3822 (1976) 64
R. Zener, *Water Pollution Control,* in *Federal Environmental Law* (1974) 48

Statutory Provisions Involved

The following provisions are lengthy and are set out in a separate appendix.

I. *U.S. Constitution*

A. Article III, Section 2

B. Article VI, cl. 2

II. *Federal Statutes Governing Subject Matter Jurisdiction and Choice of Law*

A. 28 U.S.C. § 1251

B. 28 U.S.C. § 1652

III. *State Statute Relating to Causes of Action Asserted*

A. Ill. Rev. Stat. ch. 111½, § 1012

B. Ill. Rev. Stat. ch. 14, §§ 11, 12

IV. *Statutes With Respect To In Personam Jurisdiction*

A. Fed. R. Civ. P. 4(e)

B. Ill. Rev. Stat. ch. 110, §§ 16, 17

V. *Statute Governing Venue*

A. 28 U.S.C. § 1391(b)

VI. *Statutory Provisions Relating to Defenses by Milwaukee*

A. Cost-Effective

1. 33 U.S.C. § 1292(2)(B), (C)

2. 40 C.F.R. Part 35, Subpart E, Appendix A [43 Fed. Reg. 44087 (September 27, 1978)]

B. Statutory Provisions Relating to Congressional Intent to Preserve the Application of State Statutory Law and Common Law to Impose More Stringent Antipollution Control Through Either Administrative or Judicial Action

1. 33 U.S.C. § 1365(e)

2. 33 U.S.C. § 1370

No. 79-408

IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

CITY OF MILWAUKEE, THE SEWERAGE COMMISSION OF THE CITY OF MILWAUKEE, AND THE METROPOLITAN SEWERAGE COMMISSION OF THE COUNTY OF MILWAUKEE,

Petitioners,

vs.

PEOPLE OF THE STATE OF ILLINOIS AND PEOPLE OF THE STATE OF MICHIGAN,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF RESPONDENT PEOPLE OF THE STATE OF ILLINOIS

STATEMENT OF THE CASE

Introduction

This controversy has its factual origins in the inestimable value of Lake Michigan as the principal source of water recreation and drinking water supply for millions of residents of northern Illinois. To the congested urban population of northeastern Illinois, the Illinois shoreline of Lake Michigan—particularly in the stifling heat of a midwestern summer—represents an invaluable natural treasure.

Unfortunately, the Illinois waters of Lake Michigan are extremely vulnerable to discharges of pollutants. Pollutants discharged into Lake Michigan are not uniformly dispersed into the Lake. Instead, pollutants are often transported up or down the shoreline depending on the direction of wind driven shore-parallel currents. Under winds of various speeds and persistence these shore-parallel currents can carry a polluted mass up to 60 miles along the shoreline [Pl.Ex. 20 at 115-116]. Milwaukee Harbor is only 37 miles from the Illinois state line (TR. 1020), and the defendants' South Shore treatment plant is only 25 miles from the state line (*See* Map exhibit, Pl.Ex. 137; Pet. App. at B-10 to B-12).*

Milwaukee's witnesses admit that pollutants discharged by Milwaukee will be transported into the Illinois waters of Lake Michigan.

> "Q. There is no question that everything you have seen indicates that a substance which is placed at Milwaukee will reach Illinois waters, isn't that right?
>
> A. Correct, at some frequency."
>
> Dr. Donald Pritchard, T.R. 7175

There is a second phenomenon which increases the hazards of pollution in Lake Michigan. Coupled with the transport of pollutants over long distances by these shore-parallel currents is the fact that large masses of pollutants discharged into the Lake disperse very slowly. Under adverse conditions the dilution from the original pollution strength could be as little as 15% at the time Milwaukee's pollution reached the state line (Pet. App. B-18). Defendants' witnesses at trial—using dilution tests they themselves performed—admitted that dilution of pollutants discharged at Milwaukee would be as low as 5 to 1 when they reached Illinois waters (TR. 8920; Pet. App. B-18).

---

* Hereinafter the Appendix to the Petition for Certiorari is cited as "Pet. App.," the Joint Appendix as "J.A.," and the Appendix to this brief as "Ill. App."

Illinois' concern over contamination of Lake Michigan has focused on three general categories of pollutants: 1) industrial contaminants; 2) nutrients; and 3) enteric pathogens.

Industrial Contaminants. While serving as an invaluable recreation resource and source of drinking water, southern Lake Michigan has also served the water supply needs of a vast industrial complex concentrated in south Chicago and the Indiana shoreline of Lake Michigan. Within this Chicago-Gary complex sits the largest production capacity for steelmaking in the United States as well as extensive oil refining facilities. In years past these industrial facilities used Lake Michigan as a waste sink, dumping into the Lake each day billions of gallons of wastewater contaminated with oil, greases, heavy metals and ammonia. This industrial contamination had several adverse effects: 1) it was harmful to the animal life in the Lake—particularly the bottom dwelling organisms essential to the food chain in the Lake; 2) it caused taste and ordor problems in municipal water supplies; and 3) it was hazardous to the health of persons who consumed the water.

Nutrients. Nutrients, particularly phosphorus, dramatically affect the water quality of a lake. Lakes are classified by water chemistry experts and biologists as to their "trophic" status, i.e., the quantity and quality of nutrients and biological material in the lake (TR. 2823). In an "oligotrophic" lake the water is clear and clean; in a "eutrophic" lake the water is cloudy and murky from the growth of suspended plant life known as phytoplankton (TR. 2824).

As a lake becomes more and more "eutrophic," objectionable plants are found along the shores, and when they die off, they create obnoxious smells (TR. 2826). Low levels of unobjectionable suspended algae are replaced by obnoxious forms of algae that can cause a scum on the water surface (TR. 2837). These obnoxious forms of algae can cause severe taste and odor problems in public water supplies (TR. 12527). The

nuisance and water quality degrading potential of eutrophication is not merely hypothetical. Communities along the entire lakeshore now experience taste and odor problems caused by algae in the water they get from Lake Michigan (TR. 13530). This eutrophication process also poses a threat to fish spawning grounds (TR. 12727).

Lake Michigan is becoming more and more eutrophic (TR. 2883, 3297). Several experts testified that, unless corrective action is taken to reduce the nutrient load from sewage plants, southern Lake Michigan is likely to become like western Lake Erie or Green Bay, which are notoriously degraded bodies of water (TR. 12644, 12647).

Enteric Pathogens. Raw and inadequately treated sewage contain enormous numbers of pathogenic[1] organisms, both bacteria and viruses. Any urban center like Milwaukee contains persons who are infected with pathogens and who are shedding bacterial and viral pathogens through their feces (TR. 3101, 2174).

Bacteria and viruses are two totally different pathogenic groups. Within the bacteria group there are hundreds, if not thousands, of different strains of pathogenic bacteria. For example, Salmonella has over 400 different subtypes, and Shigella has over 600 different subtypes (TR. 3053). Because of the enormous number of individual bacterial pathogens, no single test can identify the bacterial pathogens which may be present in water (TR. 3056, 3097). Instead, public health officials use an indicator—a nonpathogenic bacteria called "fecal coliform"—which has been statistically shown to be present in fecally contaminated water when pathogenic bacteria are also present.[2]

---

[1] The noun "pathogen" or the adjective "pathogenic" refers to the disease-causing nature of these organisms (TR. 2155).

[2] Unfortunately, the absence of fecal coliform bacteria has no correlation with the presence of viruses. Even a finding of no fecal coliform does not mean viruses are not present—viruses have been found in water free from fecal coliform (TR. 2201).

Viruses are the more serious group of fecal pathogens. A virus is an incredibly small object less than one millionth of an inch in diameter (TR. 10171). A single gram—1/454 pound —of human feces from an infected individual can contain millions of viruses (TR. 10278). Depending on the level of disease within the community, raw sewage can contain from approximately seven thousand to several hundred thousand viruses per liter (TR. 2180). Viruses are highly infectious and as little as one virus can cause disease (JA 157-158).

Many people infected by enteric viruses (viruses which pass from the body in feces) do not show any disease symptoms. Viruses simply multiply in the lining of the gut and are excreted with the feces without causing any disease symptoms (TR. 2157). A thousand people may become infected before one shows a clinical symptom of disease.[3] Yet these asymptomatic infected carriers pass on just as many viruses as a diseased person (TR. 2145, 2157, 2174).

The common denominator of all these enteric viruses is that they leave the body of a carrier by means of the feces (TR. 2147). Thus, fecal material is a necessary link in the transmission of the virus to the next victim. This is called "fecal-oral transmission" (TR. 2155).

---

[3] Actual disease symptoms only appear when a particular virus enters the bloodstream through the lymph glands (TR. 2143) and attacks a "target" organ, such as the heart, lungs, brain or central nervous system (TR. 2157). Polio is an enteric virus that attacks the tissue of the spinal cord (TR. 2161, 2165). Coxsackie virus causes pleurodynia—a disease of the covering of the lungs which causes a great deal of inflammation and pain (TR. 2164). Coxsackie B virus has as its target organ the muscle tissue of the heart causing such diseases as pericarditis (TR. 2167) and myocarditis. Myocarditis is a particularly severe and sometimes fatal heart disease in young children (TR. 2160). Coxsackie viruses also have been found to increase the incidence of birth defects (TR. 2167) and are suspected of triggering diabetes in susceptible individuals (TR. 13211). Hepatitis A is an enteric virus which attacks the liver (TR. 2168).

Viruses are incredibly difficult to detect with accuracy (TR. 12333). Beyond the difficulties of detecting for virus are the diagnostic and epidemiologic difficulties in tracing an enteric disease (i.e., caused by fecal-oral transmission). Because of the epidemiological problems of hidden carriers (infected persons without symptoms who may be in the chain of infection), lack of diagnosis, and lack of reporting (most cases are not reported), it is difficult, if not impossible, to trace fecal pathogen infection back to a source (TR. 2192, 13195-13198, 13223-13224).

Contrary to the statements by Milwaukee, Illinois is currently suffering fecal contamination of its northern Illinois beaches (Pl.Ex. 172, 173; TR. 3111, JA 341). Moreover, Illinois residents are currently suffering enteric bacterial and viral diseases (TR. 2155; Df. Ex. 83).

A. Illinois' Efforts To Abate Pollution Of Lake Michigan

1. The Lake Diversion Studies and the *Maris* Report

Illinois did not fully appreciate the seriousness and the interstate transmission of these pollution problems until Wisconsin and other Great Lakes States reopened the lake diversion litigation in 1959 asking that Chicago be ordered to return its treated sewage to Lake Michigan. *Wisconsin* v. *Illinois* (Nos. 1, 2 and 3 Original).

As part of the hearings in that case, the United States Public Health Service conducted extensive studies of Lake Michigan. These studies, conducted in the early 1960's, disclosed serious interstate pollution problems in Lake Michigan as to nutrients, enteric pathogens and industrial pollutants. The results of these studies—particularly as to nutrients, enteric pathogens, and pollutant transport—were incorporated into extensive findings of fact filed by Special Master Albert Maris on December 8, 1966, and adopted by this Court on June 12, 1967 (388 U.S. 426). Judge Maris' report clearly sets forth the

serious pollution problems plaguing Lake Michigan. (*See, e.g.,* Report of the Special Master at 183-190 on nutrient eutrophication.)

Judge Maris' findings as to virus are extremely pertinent here. As to drinking water supplies at water treatment plants, he concluded:

> "...It is known that virus particles can pass through the filtration process under conditions which might happen unintentionally for short periods of time in actual water treatment plants under modern practices, and that the viricidal efficiency of chlorine is considerably less than for bacteria, and is subject to wide variations. There is not known at this time any technique adaptable to field operating conditions which can insure that consistent removal of all viruses from a raw water supply subject to sewage pollution . . . *it would not be justifiable from the viewpoint of public health to subject any water supply to any contaminant known to contain or thought likely to contain pathogenic viruses,* if an alternative method of disposing of the contaminant is available."
>
> *Id.* at 205 (emphasis added)

As to the epidemiologic difficulty of attributing viral disease to a specific fecal source, Judge Maris found:

> "Public health statistics are commonly limited to a few diseases which are serious and epidemic, *and will not indicate significant differences in the incidence of viral diseases as between communities which use polluted sources of water and those which do not."*
>
> *Id.* at p. 205, 206 (emphasis added)

The extensive *Lake Currents* Report (1967) done by the Public Health Service as part of the diversion case, showed that pollutants could be transported great distances with very little dilution. (Report of Special Master, at p. 203-204). The scientist who conducted these studies was Captain James Verber of the United States Public Health Service, who testified as a witness for Illinois at the trial below. (Pet. App. B-11).

2. Illinois' Precarious Position

Illinois' Lake Michigan shoreline is relatively short —roughly 60 miles—and is sandwiched between States which have been nortoriously lenient in policing pollution of Lake Michigan by industrial and municipal polluters in their own States.

Near the Indiana/Illinois border sits a vast complex of steel mills which in years past dumped billions of gallons of contaminated wastewater daily into Lake Michigan. To the north, less than 40 miles from the Illinois/Wisconsin border sits the Milwaukee metropolitan area which, as the record in this case shows, discharges billions of gallons of raw and improperly treated sewage annually into Lake Michigan.

3. The Effort At Administrative Abatement Through the Federal Water Pollution Control Act

Prior to seeking judicial abatement against Milwaukee and other polluters in southern Lake Michigan, Illinois attempted to abate these discharges through extensive efforts at conciliation and negotiation under the administrative mechanisms of the Federal Water Pollution Control Act. 33 U.S.C. § 466. In 1965, Illinois participated in a two-state enforcement conference brought pursuant to Section 8 of the Federal Water Pollution Control Act.[4] This conference concluded that, *inter alia, "Interstate pollution endangering the health and welfare of persons* in a state other than that where the discharges originate *exists* in the waters of . . . *Lake Michigan"* (p. 1573) (emphasis added).

Unfortunately, few if any clear enforceable commitments were made to abate this interstate pollution. Even as to the weak requirements that were set, the individual States would

---

[4] Conference, *In the Matter of Pollution of the Interstate Waters of the Grand Calumet River, Little Calumet River, Calumet River, Wolf Lake, Lake Michigan and Their Tributaries* (March 1965.)

often set deadlines—only to unilaterally extend them whenever the polluters desired.

Illinois tried again in 1967, this time asking that all of the pollution discharges into Lake Michigan be the subject of a conference under the Federal Water Pollution Control Act. Secretary of Interior Udall agreed:

> "Pollution subject to abatement under the Federal Act is pollution of navigable and interstate waters which *endangers the health and welfare* of any person. I have reports that *such pollution is occurring.*"
>
> Conference, *Pollution of Lake Michigan and Its Tributary Basin,* (First Session) Vol. 1, p. 107 (emphasis added)

Secretary Udall recognized the interstate nature of the problem: "Pollution crosses political boundaries; so must solutions." *Id.* at 105. He gave an example: "Oil that spills in the lake at Gary oozes onto the beaches at Milwaukee." *Id.*

Unfortunately, Secretary Udall's aggressive concern was not reflected in the actions of the conference. The proceedings dragged on from early 1968 for the next three years in a fruitless round of meetings characterized by the same basic flaws as the earlier conference. Most of the clean up commitments were extremely vague and incapable of enforcement. There was rarely a commitment to achieve specific results—either by municipal or industrial polluters. Even where there was a small portion of a commitment which was specific, the States would administratively allow polluters to ignore deadlines with impunity.

4. Illinois Seeks Judicial Abatement

Frustrated by the wholly ineffective conference procedure, the Illinois Attorney General and the Illinois legislature turned to state judicial remedies expressly preserved by Congress in the Federal Water Pollution Control Act, P.L. 84-660, § 8(b). First in 1969, the legislature statutorily confirmed the common

law power of the Attorney General to seek judicial abatement of pollution independent of claims of administrative remedies, primary jurisdiction and administrative permits. Ill. Rev. Stat., ch. 14, §§ 11, 12 (Ill. App. 4a).

Second, the legislature passed the Illinois Environmental Protection Act, ch. 111½, § 1001 *et seq.* which specifically provided that no person shall:

> "(a) Cause or threaten or allow the discharge of any contaminants into the environment *in any State* so as to cause or tend to cause water pollution *in Illinois,* either alone or in combination with matter from other sources . . ."
>
> Ill. Rev. Stat., ch. 111½, § 1012 (emphasis added)

Using these statutory tools and state common law power to abate public nuisances, Illinois brought a series of abatement actions in Illinois state courts against Illinois and out of state major polluters of Lake Michigan. Invariably these abatement actions disclosed that the pollution control requirements imposed by administrative agencies were often little more than a cruel hoax.[5]

In contrast, this judicial enforcement program for Lake Michigan was extremely successful. As a result of court orders, several of the most severe industrial polluters of Southern Lake Michigan—both in Illinois and Indiana—have constructed modern state of the art pollution control systems, typically involving both recycling and filtration of waste waters. In each case, detailed time schedules were set with firm enforceable deadlines.[6]

---

[5] For example, both in Illinois and Indiana throughout the 1960's and 1970's, the basic agency order for pollution control for virtually all the steel rolling mill operations—which poured millions of pounds of oil and metals into Lake Michigan—was to combine the multiple outfall pipes into one or two big pipes and add water for dilution.

[6] *See, e.g., People of the State of Illinois* v. *United States Steel Corp. (South Chicago Works),* Circuit Court of Cook County, 69 CH 3334, recycle with zero discharge to Lake Michigan; *People of the*

(Footnote continued on following page)

In these cases, the Illinois courts have uniformly rejected every one of the procedural ploys raised here. *See, e.g., Metropolitan Sanitary District* v. *United States Steel Corp.*, 30 Ill. App. 3d 360, 332 N.E.2d 426 (1975), *cert. denied,* 424 U.S. 976 (1976); *People ex rel. Scott* v. *United States Steel Corp.*, 40 Ill. App. 3d 607, 352 N.E.2d 225 (1976).[7]

(Footnote continued from previous page)

State of Illinois v. *Republic Steel (South Chicago Works),* Circuit Court of Cook County, 69 CH 3675, recycle with zero discharge to Lake Michigan; *People of the State of Illinois* v. *United States Steel Corp. (Waukegan),* United States District Court for the Northern District of Illinois, Eastern Division, 72 C 2503, recycle with zero discharge to Lake Michigan; *People of the State of Illinois* v. *Youngstown Sheet & Tube Company (East Chicago, Indiana),* Circuit Court of Cook County, 71 CH 3818, complete recycle with sand filtration of remaining wastewater discharged to Lake Michigan; *People of the State of Illinois* v. *United States Steel Corp. (Gary Works),* Circuit Court of Cook County, 72 CH 258, complete recycle with sand filtration of remaining wastewater discharged to Lake Michigan. Many of these remedial court ordered programs have either been completed or are currently under construction.

[7] In invoking the power of the court to order the performance of remedial acts outside its territorial jurisdiction by a person over whom the court had *in personam* jurisdiction, Illinois relied on the following authority: *see Alexander* v. *Tolleston Club,* 110 Ill. 65 (1884); *White Star Mining Co.* v. *Hultberg,* 220 Ill. 578, 77 N.E. 327 (1906); *Craft* v. *I. D. & W. Ry. Co.,* 166 Ill. 580, 46 N.E. 1132 (1897); *The Salton Sea Cases (California Development Co.* v. *New Liverpool Salt Co.),* 172 F. 792 (9th Cir. 1909); *see* E. Messer, *Jurisdiction of A Court of Equity Over Persons to Compel the Doing of Acts Outside the Territorial Limits of the State,* 14 Minn. L.Rev. 494 (1930). *See also Steele* v. *Bulova Watch Co.,* 344 U.S. 280, 289 (1952). Illinois' use of its statutory prohibition against water pollution and its state common law nuisance power against out of state polluters of Illinois waters was given express approval by this Court in its decision in *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971). *See also Ohio* v. *BASF Wyandotte,* 2 ELR 20338 (N.D. Ohio 1972).

B. *Illinois* v. *Milwaukee* In The Supreme Court Round One

With few exceptions, Illinois suits to abate Lake Michigan pollution were brought in state courts. One exception was *Illinois* v. *City of Milwaukee,* No. 49 Original filed December 9, 1970. Illinois' position was clear: the State wanted to invoke the original jurisdiction of this Court to avoid the delays resulting from "long drawn out contests in the lower courts." Illinois Statement and Brief in Support of Motion to File a Bill of Complaint, at 15. In support of its motion for leave to file, Illinois likened the suit to one against the State of Wisconsin itself, rendering jurisdiction a "constitutional imperative." *Id.* at 15-16.

The defenses raised by the Milwaukee defendants in *Illinois* v. *Milwaukee* were virtually identical to those now raised ten years later: (1) Illinois should be barred from proceeding in the Supreme Court because the three year old Federal Water Pollution Control Act conference provided an adequate administrative remedy. County Sewerage Commission Brief, at 8-9. (2) The Secretary of Interior had initiated abatement action and Milwaukee was under state agency abatement orders. *Id.* at 4. (3) The Court should bar judicial action and invoke the doctrine of primary jurisdiction. *Id.* at 9. (4) Illinois should be required to exhaust its administrative remedy before going to Court. *Id.* at 9. (5) The only judicial remedy available against Milwaukee was judicial review of the Secretary's actions in an action under the Administrative Procedure Act. City Sewerage Commission Brief, at 6.

On April 24, 1972, this Court rendered its decision in *Illinois* v. *Milwaukee,* 406 U.S. 91. The Court rejected *sub silentio* Milwaukee's claims of exhaustion of administrative remedies and primary jurisdiction, and declared that an interstitial *federal* common law was available as a supplemental judge-made remedy to effectuate the Congressional purpose in the Federal Water Pollution Control Act and related federal statutes dealing with water quality. (*See* discussion, 32-45 *infra*).

C. The Procedural History Of This Case

1. The Complaint

Immediately after this Court's 1972 decision, Illinois filed a complaint against Milwaukee in the United States District Court for the Northern District of Illinois. The complaint had three separate counts, each setting forth a different substantive right. Two counts had the source of the right asserted in state law as articulated in *Ohio* v. *Wyandotte Chemicals Corp.*, and one count was based on the interstitial federal common law articulated in *Illinois* v. *Milwaukee:* a) Count I charged Milwaukee with the creation of a federal common law nuisance; b) Count II charged Milwaukee with violation of statutory prohibitions against water pollution contained in the Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½, § 1001 *et seq.;* and c) Count III charged Milwaukee with the creation of a common law nuisance under Illinois law.

2. Milwaukee's Pre-Trial Maneuvers

For four years, Milwaukee desperately tried to avoid trial by a virtual blizzard of procedural and substantive arguments (JA 1-9).

Milwaukee moved to dismiss for lack of *in personam* jurisdiction and improper venue.

Coupled with this motion was the claim that Milwaukee should be permitted to discharge raw sewage because the discharge of raw sewage had been an accepted practice in the United States for 200 years.

Milwaukee also asked that the complaint be dismissed and that Illinois be required to take its complaint to the Great Lakes Basin Commission.

With the passage of the 1972 amendments to the Federal Water Pollution Control Act, Milwaukee moved to dismiss the complaint on the ground that the 1972 amendments preempted the federal common law of nuisance.

In May 1976, after a trial date had been set, Milwaukee moved: a) to declare the action a class action with all polluters of Lake Michigan as a class; b) to join all pollution sources of Lake Michigan; and c) to declare the case a complex case and postpone the trial.

Again in May 1976 Milwaukee filed another motion to dismiss arguing that the permits issued by Wisconsin pursuant to the 1972 FWPCA amendments preempted this action.

In July 1976, Milwaukee again filed a motion to postpone trial date.

In late 1976, shortly before the scheduled trial date, Milwaukee filed a mandamus petition with the United States Court of Appeals asking that the trial be postponed.

Milwaukee's approach to these procedural arguments is illustrated by a pre-trial memorandum written by Milwaukee trial counsel during late 1976, when trial was rapidly approaching:

> "It is important to stress at the outset that the practical chance of obtaining any form of pretrial appellate relief *even simply in terms of additional trial delay is extremely slim.* Nonetheless, if we can afford to devote the necessary manpower, an aggressive appellate program *combined with a further motion program before the District Court may spread more thinly the time our opposition lawyers can devote to trial preparation and wear down their energies in this matter a bit.*"
>
> (Ill. App. 104a) (emphasis added)

* * *

> There is also no discussion here of the *possibility of drafting up a raft load of third-party complaints* and seeking leave of the District Court pursuant to Rule 14, Federal Rules of Civil Procedure, for *service of same upon other polluters of the lake and of the Milwaukee River.*
>
> (Ill.App. 113a) (emphasis added)

* * *

> . . . If it is felt we can spare the time, it would appear that an *aggressive pretrial mandamus and appellate program* would at least have the *positive effect of forcing our opposition to fight the battle on many fronts* and thus, perhaps, *diluting their efforts a bit.* Certainly, it is hard to see what we would lose by such an approach.
>
> (Ill. App. 113a) (emphasis added)

Only when the mandamus petition and all of the other procedural maneuvers were finally put to rest was Milwaukee forced to trial.

3. The Evidence at Trial

As two courts have held after exhaustive reviews of the exhibits and testimony, the evidence of Milwaukee's pollution of Illinois waters of Lake Michigan was overwhelming. Both extensive test data and the testimony of scientists—including admissions by defendants' own witnesses—established the following points.

Milwaukee, through overflow devices in its separate sanitary sewer area and its Combined Sewer Area discharges enormous amounts of raw sewage into Lake Michigan. Additionally, defendants' overloaded treatment plants also discharge huge quantities of improperly treated sewage into Lake Michigan (Pet. App. B-2—B-10). These raw and inadequately treated fecal wastes contain billions of pathogenic bacteria and viruses (Pet. App. B-8).

These fecal wastes—and the bacteria and pathogens within them—are periodically transported by prevailing shore-parallel currents into the Illinois waters of Lake Michigan. Defendants' own tests of current speeds, direction and persistence confirm this fact, and defendants have admitted that Milwaukee's pollution discharges reach Illinois waters (Pet. App. B-10—B-17).

Defendants' own tests as well as their experts' own admissions establish that low dilution of these substances occurs and that hazardous concentration of these pathogens still remain when they reach Illinois waters (Pet. App. B-18—B-19).

Contrary to Milwaukee's claims, there is direct evidence of fecal contamination at Illinois beaches directly south of the Wisconsin line (Pl. Ex. 172, 173; Pet. App. B-19—B-22).

Contrary to Milwaukee's claims, there is direct evidence of enteric diseases being suffered by Illinois citizens; diseases which are necessarily caused by fecal-oral transmission (Df. Ex. 83; TR. 2217, 13228).

In addition to the public health concerns, Milwaukee sewage contains large amounts of phosphorus—a critical nutrient for the growth of plant life in Lake Michigan. From its treatment plants alone, Milwaukee discharges over one million pounds of phosphorus a year—50% of the sewage load of phosphorus discharged into all of Lake Michigan (TR. 12929). No one can estimate how much more phosphorus comes from the raw sewage overflows. Nutrients, particularly phosphorus, dramatically accelerate the eutrophication problems of the Lake. Communities along the entire lakeshore now experience taste and odor problems caused by algae in the water they get from Lake Michigan (TR. 13530). This increasing eutrophication also poses a hazard to fish spawning grounds (TR. 12727).

In response to Milwaukee's attempts to disparage the trial judge and to take out of context isolated portions of his findings, Illinois directs the Court to the following sources of evidentiary analysis: (1) the entire District Court findings of fact (Pet. App. F-1—F-30); (2) the incredibly detailed review of the evidence by the Court of Appeals. (Pet. App. A-26—A-40, B-1—B-32); (3) the Supplemental Memorandum of the State of Illinois filed pursuant to the Order of the Court of Appeals of May 26, 1978 (JA 118-196, 331-349).

4. The Judgment of the District Court on Liability

After hearing months of testimony and reviewing hundreds of exhibits, the District Court entered judgment on all counts of Illinois' complaint, finding that defendants' discharges constituted: (a) a federal common law nuisance; (b) a violation of

the Illinois Environmental Protection Act; and (c) a common law nuisance under Illinois state law. (Pet. App. F-24, *see also* Pet. App. F-2).

5. The Remedy Ordered by the District Court

Having found liability, the District Court entered a judgment order designed to abate the nuisance. The District Court's remedy with respect to the elimination of disease-causing organisms[8] was in two parts:

a. *Collection.* The District Court ordered that the raw sewage be collected for treatment instead of being discharged raw into Lake Michigan.

(i) *The Separated Sewer Area.* Approximately 95% of the 420 square mile sewer collection systems in Metropolitan Milwaukee is a so-called "separated" system. Only 5% of the area is served by combined sewers—the so-called "CSO" area. In the Separated Sewer system, the sanitary sewage by design is carried to the treatment plant for treatment and separate storm sewers carry off storm water from roofs, yards, and streets to public waters. In Milwaukee, the sanitary sewer collection system in this separated area has become severely overloaded.

Not the least cause of these hydraulic overloads was defendants' conscious practice of building larger diameter sewers in outlying areas which were connected to smaller diameter sewers leading to the treatment plant—resulting in more sewage flow than the pipe can handle (TR. 139-140, 333-334).

In the 1950's Milwaukee began to build overflow devices in the Separated Sewer Area to allow these increasing fecal

---

[8] To abate the eutrophication nuisance, the District Court ordered an effluent limitation *less than* 1 mg/l phosphorus which would be "the inevitable consequence of the type of advanced treatment" being ordered to destroy disease bearing organisms (Pet. App. F-26).

loads into local streams and into Lake Michigan (TR. 131).[9] At the present time, Milwaukee (the City Sewerage Commission) maintains 50 of these overflow devices in the interceptor sewer system for the separated area (TR. 134), and the City of Milwaukee maintains 78 overflow devices in the separated area on the local sanitary collector sewers.

As to the Separated Sewer Area, the Judgment Order entered by the District Court and the permit requirements issued by the State of Wisconsin are identical to Illinois Requirements—*elimination* of the overflows (JA 358, 379, 416, 438; Ill. App. 57a, 79a).[10] The only real difference is that the state permit has no effective enforceable deadline, whereas the Judgment Order entered by the District Court has a specific deadline—1986.

(ii) *Combined Sewer Area (CSO).* As to the portions of the sewer area containing combined sewers (CSO), the Judgment Order provides that Milwaukee collect, store and treat the sewage from the CSO (JA 358-359). The District Court did *not* select or dictate the method or the time schedule for achieving collection of sewage (Pet. App. F-26). The evidence had established several alternatives for effective collection, including:

1. Sewer separation, e.g., taking the storm drainage—intentional or unintentional—out of the combined sewer and leaving an adequate sanitary sewer to carry the sewage to the plants.[11]

---

[9] Contrary to Milwaukee's unsupported claim that overflows from such a system are largely "storm water runoff"; fecal coliform counts in the sewage discharged from Milwaukee's sewage system overflows have been recorded as high as 23 *million* per 100 milliliter (Pet. App. B-9). The effluent limit for supposedly safe levels of fecal coliform is 200 per 100 ml.

[10] Within the context of the Amended Judgment Order, "eliminate" means to treat the sewage to the level of secondary treatment (30/30) with disinfection.

[11] A generalization is often made that sewer separation is too expensive even though it is the surest way to provide environmental protection. Ironically, here Milwaukee studies have shown that separation compares favorably in cost to other systems.

2. Collection, Storage, Treatment (CST). Rather than separate the storm drainage from the sanitary waste, the design here is to collect the mixture of storm water and sewage, store it, and then gradually pump the stored wastes for treatment.

Milwaukee—not the District Court—then proceeded to select a collection, storage, and treatment (CST) system as the basis of collection. The Judgment Order of which Milwaukee now complains was prepared by Milwaukee lawyers and engineers (with plaintiffs' participation) and submitted to the District Court for approval on November 14, 1977. The Judgment Order expressly provides for modification if there is a lower cost, equally effective alternative (JA 360).

Milwaukee also selected the timetable for collection and correction of raw sewage CSO overflows. This timetable calls for a staged program of overflow correction which will be completed by 1989. Having negotiated the timetable with plaintiffs, having stipulated as to the feasibility of the timetable (Pet. App. E-2) and having submitted the timetable to the District Court, Milwaukee can hardly complain about the timetable. The Judgment Order's 1989 deadline should be compared to the open ended deadline in the Dane County stipulation which extends into the year 2020.

b. *Treatment.* The District Court then ordered that all of the raw sewage—once collected—be treated to destroy the disease-causing organisms in the sewage. The level of treatment ordered by the District Court is not at issue in Milwaukee's Petition. The appellate court reversed the District Court's treatment order on the extra-record and erroneous factual assumption that "secondary" treatment—established as *minimum* treatment by the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*—would destroy viruses. This assumption has no factual support in the record and indeed is contradicted by evidence in the record. Appellate courts cannot make factual conclusions which have not been the subject of evidentiary proof in the trial court and which cannot be judicially noticed. ***Borden Farm***

Products v. *Baldwin,* 239 U.S. 194, 208-209 (1934). The appellate court's action is the subject of Illinois' pending Petition for a Writ of Certiorari, No. 79-571.

6. The Decision of the Court of Appeals

The Court of Appeals conducted an intensive independent review of the facts and affirmed the District Court both as to liability and the remedy ordered for sewage collection. (Pet. App. A-1—A-48, B-1—B-32).

SUMMARY OF ARGUMENT

This case is hopefully the final stage in an incredible 13 year odyssey by the State of Illinois to abate the gross discharges of raw and improperly treated sewage by Milwaukee into the Illinois waters of Lake Michigan. However, the decision in this case will have major impacts far beyond the prevention of water pollution. The Court's decision in this case necessarily involves several major constitutional and statutory issues which affect all suits between a State and a citizen of another State.

A. Legal And Constitutional Framework For Illinois' Claims

This Court cannot properly evaluate the arguments raised by Milwaukee without a thorough examination of the subject matter jurisdiction, choice of law and supremacy questions created under the Constitution and Judicial Code when a State sues a citizen of another State. Directly involved in this case are the constitutional choice of law principles mandated by *Erie* v. *Tompkins, supra,* as articulated in the constitutional choice of forum analysis in *Ohio* v. *Wyandotte Chemicals Corp., supra.*

Though the subject of this suit is sewage contamination, the constitutional choice of law and choice of forum questions raised here apply to all suits by a State against a citizen of another State, whether the subject of the dispute is taxes, labor,

contracts or any of dozens of other disputes. Under Article III and the Judicial Code, the following constitutional mandates apply to this case:

1. Under the Constitution, a State cannot be compelled to bring its complaint against a citizen of another State in that citizen's state courts. *Wisconsin* v. *Pelican Insurance Co.,* 127 U.S. 265, 289 (1888); *Chisholm* v. *Georgia,* 2 Dall. 419 (1793); *Ohio* v. *Wyandotte Chemicals Corp., supra,* 401 U.S. at 500. Consequently, Illinois cannot be compelled to subject itself to the control of Wisconsin courts or agencies. Absent federal question jurisdiction, the only constitutionally permissible forum is either the Supreme Court or the courts of the complaining State.

2. Under the mandate of *Erie* v. *Tompkins,* in suits by a State against a citizen of another State, the law applied must be the law which is the source of the right asserted. If the right asserted has its source in federal law the court—be it state or federal—must apply federal law. Conversely, if the right asserted is based on state law the court—be it state or federal—must apply state law.

3. Interstitial federal common law—judge-made law intended to fulfill a Congressional purpose behind a statutory program—can only oust concurrent state law if Congress expressly intends such an ouster. Here, rather than evidence an intent to oust state law, Congress has expressed its desire that state statutory and common law be preserved. Consequently, Illinois' claims on state statutory and common law cannot be ousted by interstitial federal common law based on these same statutes.

4. In addition to declaring its express intent to preserve state statutory and common law, Congress has been expressly informed of this Court's decisions declaring interstitial federal common law, *e.g., Washington* v. *General Motors Corp., supra,* (post 1970 Amendments to the Clean Air Act); *Vermont* v. *New York, supra,* (post 1972 Amendments to the FWPCA). More-

over, Congress has been expressly informed of lower court decisions interpreting Congressional intent in the 1972 Amendments to the FWPCA as preserving the interstitial federal common law articulated by Justice Douglas.

5. The District Court properly held that federal law governed the federal common law count of Illinois' complaint and that state law governs the state statutory and state common law claims in Counts II and III. The District Judge's decision was mandated by the constitutional choice of law mandate set forth in *Erie,* the constitutional limits on judicial power to oust state law by the operation of interstitial federal common law, and the unequivocal intent of Congress to preserve state statutory and state common law remedies.

B. The Evidence To Support The Decision On Liability

Both the District Court and the appellate court found clear and convincing evidence of Milwaukee's liability (Pet. App. F-15, F-23, A-27). The appellate court's exhaustive analysis of the evidence is contained at pages B-2 and B-27 of the Petitioner's Appendix.

Given the detailed findings by the District Court, the detailed analysis of the testimony and evidence by the Court of Appeals, the "two-court" rule applied in *Berenyi* v. *District Director, Immigration & Naturalization Service,* 385 U.S. 630, 636 (1967) and *Graver Tank & Manufacturing Co.* v. *Linde Air Products,* 336 U.S. 271, 275 (1949), should be applied here.

This Court "cannot undertake to review concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error". *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co., supra,* 336 U.S. at 275.

C. Milwaukee's Arguments

1. *Compliance with Wisconsin abatement orders.* The District Court's order provides both specific substantive abatement obligations plus clear, reasonable deadlines for com-

pliance. In contrast, Wisconsin's abatement requirements continue the problems which have plagued Illinois since 1967: ill-defined, unenforceable substantive obligations and open-ended deadlines for compliance. Moreover, contrary to Milwaukee's arguments, the District Court's order is wholly consistent with the federal act requirements.

a. Separated Sewers. What Milwaukee does not tell the Court is that 95% of Milwaukee's sewers are separate sewers—not combined sewers—and that all the governmental agencies involved say that these separate sewers overflows should be eliminated and the sewage wastes conveyed to treatment. Unfortunately, Wisconsin has no enforceable deadline for such obligations.

b. Combined Sewers. As to combined sewers, all the governmental agencies involved and the statute say that such overflows must have water quality based effluent limitations under § 301(b)(1)(C), § 303(d), and § 303(c) of the Act which insure—with a "margin of safety"—that Lake Michigan water quality standards be achieved and not violated.

Wisconsin has failed to impose any effluent limitations on combined sewer overflows under § 303(d) and § 301(b)(1)(C) to achieve compliance with Lake Michigan water quality standards. Indeed, there are no effluent limitations at all on any of the combined sewer overflows imposed by Wisconsin. Moreover, any vague control that may be imposed need not be installed until the year 2025 or later.

Fortunately, Illinois cannot be barred from relief by Wisconsin's ill-defined open-ended abatement orders. The law is absolutely clear that compliance with a permit is not a defense to actions for common law nuisance. This doctrine is followed not only in Illinois and many other jurisdictions but is the explicit rule followed in Wisconsin.

2. *Cost-Effectiveness.* As to *combined* sewers, Milwaukee and the other sewage agencies want this Court to be their foil in a major game of legislative manipulation. Right now § 303(c)

and § 301(b)(1)(C) of the Act require all point sources to meet effluent limitations necessary to prevent violation of water quality standards. "Cost-effective" as used in the Act—§ 212—is clearly defined now in the EPA regulations as the least-cost way *to achieve* water quality based effluent limitations. (§ 301(b)(1)(C)). Violations of water quality standards are illegal.

Milwaukee wants this Court to reinterpret "cost-effective" to give this Court's permission to eliminate water quality standards violations which are not "cost-justified" or cost-effective as Milwaukee uses the term. Having failed to get Congress to weaken § 303(c) and § 301(b)(1)(C), Milwaukee wants this Court to fashion judicial legislation to overturn these statutory obligations.

3. *In personam jurisdiction.* A District Court's jurisdiction over the person of a nonresident defendant is dependent upon the extra-territorial service statute of the forum state. Fed. R. Civ. P. 4(e). In this case the Illinois "long arm" statute, Ill. Rev. Stat., ch. 110, §§ 16 and 17, control. Section 17, which lists the actions of a defendant by which it submits to the jurisdiction of an Illinois court, includes "[t]he commission of a tortious act within Illinois."

The Illinois Supreme Court has repeatedly held that the Illinois long arm statute reflects a conscious legislative purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause, and that Section 17 reaches nonresident defendants who commit acts in other states which result in injury in Illinois.

In the face of these unequivocal constructions of the Illinois statute by the highest court in the State—and the findings below that "[e]ach year defendants pump into Lake Michigan millions of gallons of pathogen-containing sewage, which the District Court found is sometimes carried into Illinois water and presents a substantial threat of harm to Illinois residents" (Pet.

App. A-5)—there is no basis whatsoever for Milwaukee's contentions that: 1) its discharge of raw sewage and disease-causing organisms into Illinois waters does not constitute commission of a tortious act in Illinois and; 2) its discharge of contaminants into Illinois waters does not constitute a sufficient "minimal contact" with Illinois to support *in personam* jurisdiction.

4. *Venue.* In this case, venue is governed by 28 U.S.C. § 1391(b), the general venue statute governing transitory actions in federal courts where jurisdiction does not depend on diversity of citizenship. Section 1391(b) permits suit in *either* the "judicial district where all defendants reside, or in which the claim arose. . . ." Under federal law there is no question but that Illinois' "claim arose" within the Northern District of Illinois, and venue was proper.

This Court should affirm the District Court, as affirmed by the Seventh Circuit Court of Appeals, with respect to the issues raised in Milwaukee's Petition.

ARGUMENT

I

UNDER THE CONSTITUTION ILLINOIS CANNOT BE COMPELLED TO LITIGATE ITS CLAIM AGAINST MILWAUKEE IN THE STATE COURTS OF WISCONSIN

A good deal of Milwaukee's confusion in this case lies in its disregard of the constitutional protections given the States when they joined the Union. Contrary to Milwaukee's argument, Illinois cannot be forced to litigate its claim in either Wisconsin state courts or Wisconsin state agencies. Under both the Constitution and the Judicial Code the only forums where an aggrieved State can be constitutionally compelled to litigate its claim against a citizen of another State are courts of the complaining State and Article III federal courts. Moreover, absent federal question jurisdiction under 28 U.S.C. § 1331 or some other specific grant of lower federal court jurisdiction, the only Article III federal court available is the Supreme Court.

A. This Is A Suit By A State Against A Citizen Of Another State

Article III, § 2, cl. 1 of the Constitution creates judicial power to decide controversies "between a State and Citizens of another State" and between "citizens of different States". Article III, § 2, cl. 2 confers original jurisdiction on the Supreme Court for cases in which a State is a party. Finally, the Judiciary Act of 1789, as currently reflected in the Judicial Code, states that the Supreme Court shall have *original but not exclusive* jurisdiction of all actions or proceedings by a State against the citizens of another State. 28 U.S.C. § 1251(b)(3).

As to suits between citizens of different States, the Judiciary Act of 1789—as currently reflected in the Judicial Code—states that the federal district courts shall have original jurisdiction of all civil actions between citizens of different States. 28 U.S.C. § 1332.

The overall reason for both jurisdictional grants was the same—to prevent prejudice to litigants from presumably biased local courts. "Without doubt the underlying considerations were akin to those which prompted the diversity clause . . ." *Hart & Weschsler, The Federal Courts and the Federal System* 18 (2d Ed. 1973). However, in actual implementation, the Judiciary Act of 1789 treated the two constitutional grants differently in allocating subject matter jurisdiction.

There are two reasons for the differences in the jurisdictional grants. First, absent a federal question, the only federal forum for a suit by a State against a citizen of another State is the Supreme Court. The prestige and dignity of a suing State was deemed entitled to invoke a federal forum of equal prestige. *The Federalist No. 81* (A. Hamilton) 548 (Cooke Ed. 1961). Consequently there was no need to provide a lower federal tribunal. Second, subject matter jurisdiction of a complaint by a State against a citizen of another State was not granted *exclusively* to the federal Supreme Court because the framers of the Constitution clearly anticipated an aggrieved State suing a citizen of another State in the complaining State's courts. *Plaquemines Tropical Fruit Co.* v. *Henderson,* 170 U.S. 511 (1898); *Germania Insurance Co.* v. *Wisconsin,* 119 U.S. 473, 475 (1886).

One of the key elements of this constitutional allocation of judicial power was that the complaining State could not be compelled to have its complaints tried in the State courts of the nonresident defendant. *Wisconsin* v. *Pelican Insurance Co.,* 127 U.S. 265, 289 (1888); *Chisholm* v. *Georgia,* 2 Dall. 419, 475-476 (1793). Justice Harlan restated this principle in *Ohio* v. *Wyandotte, supra:*

> "Two principles seem primarily to have underlain conferring upon this court original jurisdiction over cases and controversies between a State and citizens of another State or country. The first was the belief that *no State should be compelled to resort to the tribunals of other States*

for redress since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own. Chisholm v. *Georgia,* 2 Dall. 419, 475-476 (1793); *Wisconsin* v. *Pelican Ins. Co.,* 127 U.S. at 289."

401 U.S. at 500 (emphasis added)

Applying these principles to this dispute between Illinois and a citizen of Wisconsin, the Constitution is absolutely clear that neither the federal Judiciary nor Congress can compel Illinois to adjudicate its claims in the state courts of Wisconsin. *A fortiori,* Illinois cannot constitutionally be compelled to submit these claims to the administrative agencies of the State of Wisconsin.[12]

B. This Is Not A Suit By A State Against Another State

It is critical to emphasize that this Court has expressly held that this is *not* a suit between a State and another State. *Illinois* v. *Milwaukee, supra,* 406 U.S. at 98. This distinction—between a suit by one state sovereign against another state sovereign (with exclusive original jurisdiction in the Supreme Court) as distinguished from a suit by a State against a citizen of another State (with alternative jurisdiction in the Supreme Court or the plaintiff State's courts) has major significance in the constitutional rules governing choice of law (see discussion, *infra*).

C. This Court's Dilemma Really Centers On The Search For An Alternative Forum

In both *Ohio* v. *Wyandotte* and *Illinois* v. *Milwaukee,* the main focus of this Court's concern was the need to find an alternative forum. As Justice Harlan made clear in *Ohio* v. *Wyandotte,* there are literally hordes of cases where States and citizens of other States come into conflict, including disputes over "taxes, motor vehicles, decedents' estates, business torts, government contracts, and so forth." 401 U.S. at 497.

---

[12] Indeed, *sub silentio* the Court's 1972 decision in this case rejected Milwaukee's argument that Wisconsin state courts and Wisconsin administrative agencies could determine this controversy.

He then went on to observe that there were two reasons why, under the constitutional framework, disputes between a State and a citizen of another State had to come before the Supreme Court:

> "The first was the belief that no State should be compelled to resort to the tribunals of other States for redress, since parochial factors might often lead to the appearance, if not the reality, of partiality to one's own. *Chisholm* v. *Georgia,* 2 Dall. 419, 475-476 (1793); *Wisconsin* v. *Pelican Ins. Co.,* 127 U.S., at 289. The second was that a State, needing an alternative forum, of necessity had to resort to this Court in order to obtain a tribunal competent *to exercise jurisdiction over the acts of nonresidents of the aggrieved State.*"
>
> *Id.* at 500 (emphasis added)

It is this second *in personam* jurisdiction limitation which was driving cases to the Supreme Court. The Constitution had been drafted when the physical power principles of *Pennoyer* v. *Neff,* 95 U.S. 714 (1878), dominated concepts of *in personam* jurisdiction. But as Justice Harlan noted, just as there had been growth in the multitude of disputes between States and citizens of other States, concepts of *in personam* jurisdiction had expanded to permit complaining States to sue in their own courts. 401 U.S. at 497, 500.

It was this finding of the alternative forum which allowed the Court to avoid the burden of an original action in the Supreme Court while still fulfilling its constitutional duty under Article III:

> "Thus, at this stage we go no further than to hold that, as a general matter, we may decline to entertain a complaint brought by a State against the citizens of another State or country only where we can say with assurance that (1) declination of jurisdiction would not disserve any of the principal policies underlying the Article III jurisdictional grant."
>
> *Id.* at 499

Illinois believes that this Court's approach in *Wyandotte* was correct. Given the thousands of disputes arising between States and citizens of other States over a huge range of substantive matters, the Court has the following options:

1. It can hear the cases by means of a master. This the Court is constitutionally obliged to do if there is no constitutionally acceptable alternative forum.

2. It can reaffirm the *in personam* principles set forth in *Ohio* v. *Wyandotte.* This would leave the bulk of the actions in the state courts where they can be properly resolved without burdening this Court.

3. It can continue to fashion substantive interstitial federal common law rights, as in *Illinois* v. *Milwaukee,* in order to find an alternative lower court federal forum.

II.

CHOICE OF LAW—UNDER THE CONSTITUTION THE LAW TO BE APPLIED IN DETERMINING CLAIMS OF SUBSTANTIVE RIGHT IS THE LAW WHICH IS THE SOURCE OF THE SUBSTANTIVE RIGHT

The substantive law to be applied to a claim is determined not by the forum the parties find themselves in—but by the source of the law. If the source of the law is state law, the court, be it federal or state, must under *Erie R. Co.* v. *Tompkins,* 304 U.S. 64 (1938), apply state law. If the source of the law is federal, the court must apply federal law. Where, as here, the State has brought separate claims based on federal law and state law, federal law dictates the right to recover under the claim which has its source in federal law. However, state law dictates the right to recover on the state law claims in counts II and III.

This mandate is found in both the basic concepts of federalism and the constitutional limitations on the power of federal courts to make their own law as embodied *Erie R. Co.*

v. *Tompkins* and the Rules of Decision Act, 28 U.S.C. § 1652. *See Guaranty Trust Co.* v. *York,* 326 U.S. 99, 112 (1945).

This statutory and constitutional mandate has repeatedly been recognized by courts and commentators:

> "... there are several reasons for applying state law in original suits by a state against a citizen of another state. Although a state has been held "not to be a citizen of itself" for purposes of diversity jurisdiction in the federal trial courts, *the situation is analogous to ordinary diversity suits.* This analogy supports the application of section 1652 of the Judicial Code, the statute construed in the *Erie* case, and the application of this statute would also avoid the constitutional problems suggested by the *Erie* decision.
>
> The policy grounds for the *Erie* doctrine would also seem to apply to suits between a state and citizens of a sister state under the original jurisdiction. *Since these suits may also be brought in a state court,* the Supreme Court would be promoting uniformity and limiting "forum shopping" as between the state courts and the Supreme Court if *Erie* were applied."[13]
>
> Note, *The Original Jurisdiction of the United States Supreme Court,* 11 Stan. L.Rev. 665, 684-85 (1959) (emphasis added)

Justice Harlan applied the *Erie* mandate in *Ohio* v. *Wyandotte* and stated that *Erie* would require the application of state law to Ohio's claim based on Ohio nuisance law even if there were subject matter jurisdiction in the federal district court. 401 U.S. at 498 n.3.

---

[13] Technically the statement that "state" law should apply is in error. While it is correct that *Erie* would apply to such suits, the *Erie* rule requires application of the law which is the source of the right asserted. Thus where the State is seeking to enforce a right based on federal law, federal law governs. Where the source of the right is state law, state law governs. *See, Maternally Yours, Inc.* v. *Your Maternity Shop, Inc.,* 234 F.2d 538, 540-41 & n.1 (2d Cir. 1956).

III

JUDICIAL DECLARATION OF A FEDERAL COMMON LAW RIGHT AS AN INTERSTITIAL REMEDY TO EFFECTUATE A CONGRESSIONAL PURPOSE CANNOT OUST STATE LEGISLATURES AND COURTS OF THEIR LAW-MAKING POWER UNLESS CONGRESS CLEARLY INTENDS STATE LAW TO BE OUSTED

Federal courts have a necessary constitutional function to effectuate the congressional purpose reflected in statutes by providing interstitial remedies which are characterized as "*federal*" common law. However, the federal courts' power to preempt or oust state law from concurrently addressing the same problem area is only as extensive as the congressional intent to oust state law. Where Congress has expressly and repeatedly stated its desire to preserve state statutory and common law remedies, federal courts cannot—in the guise of creating interstitial federal common law and under the authority of those same congressional enactments—judicially oust state statutory and common law.

A. The Source of the Federal Common Law of Nuisance Articulated by This Court Was "Interstitial" Federal Common Law

One of the key inquiries here is the source of the federal common law articulated by Justice Douglas in *Illinois* v. *Milwaukee*. Clearly the Court was creating what has been called "interstitial" federal common law. As explained by Professor Mishkin:

> "At the very least, effective Constitutionalism *requires recognition of power in the federal courts to declare, as a matter of common law or "judicial legislation,"* rules which may be necessary to fill in *interstitially or otherwise effectuate the statutory patterns enacted in the large by Congress.* In other words, it must mean recognition of federal judicial competence to declare the governing law in an area comprising issues substantially related to an established program of government operation."

> Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision,* 105 U. Pa. L. Rev. 797, 800 (1957) (emphasis added)

There are numerous examples of this Court's exercise of such interstitial power by declaring a federal remedy or right. Where Congress had failed to specifically address the particular problem before the Court, the Court fashioned a judge-made remedy to effectuate a perceived congressional purpose. *Board of Commissioners of Jackson County* v. *United States,* 308 U.S. 343 (1939); *Deitrick* v. *Greaney,* 309 U.S. 190 (1940); *D'Oench, Duhme & Co.* v. *FDIC,* 315 U.S. 447 (1942); *Clearfield Trust Co.* v. *United States,* 318 U.S. 363 (1943).

Perhaps the broadest assertion of such interstitial power was in *Textile Workers Union of America* v. *Lincoln Mills,* 353 U.S. 448 (1957). *Lincoln Mills* and the authority upon which it rests are based on express determinations by the Supreme Court that development of such *federal* common law remedies was contemplated by Congress as an interstitial remedy as part of its legislative grant of authority. 353 U.S. at 455.

In *Illinois* v. *Milwaukee,* Justice Douglas followed the same pattern in finding an interstitial federal common law based on the then existing federal statutes dealing with water quality. He began by citing the broad range of federal statutes dealing with interstate waters. 406 U.S. at 101-02. He then turned to the delineation of the federal common law remedy within this multitude of federal statutes, including the Federal Water Pollution Control Act:

> "The remedy sought by Illinois is not within the precise scope of remedies prescribed by Congress. Yet the remedies which Congress provides are not necessarily the only *federal* remedies available."
>
> 406 U.S. at 103 (emphasis added)

Justice Douglas then cited as authority this Court's decision in *Lincoln Mills:*

> "It is not uncommon for federal courts to fashion federal law where federal rights are concerned. *Textile Workers* v. *Lincoln Mills,* 353 U.S. 448, 457."
>
> *Id.*

Thus the Court was clearly basing its articulation of federal common law on the same kind of interstitial common law development based on a statutory scheme which had been used in *Board of Commissioners, supra, Dietrick, supra,* and *D'Oench, supra.*

B. Federal Interstitial Common Law Cannot Oust Concurrent State Statutory and State Common Law Unless the Statutory Scheme on Which the Interstitial Federal Common Law is Based Demonstrates A Clear Intent To Oust State Law.

While *Board of Commissioners, D'Oench, Deitrick* and similar decisions clearly establish the principle that federal courts can establish an interstitial federal common law and hold that federal, not state, law determines the extent of the federal right—such cases do not deal with the question of whether interstitial federal law preempts (i.e. ousts) concurrent state statutory and common law from protecting state law rights. The only cases dealing with ouster of state law by federal common law have found express evidence of congressional intent to oust concurrent state activity.

In *Local 174, Teamsters* v. *Lucas Flour Co.,* 369 U.S. 95 (1962), the Court did hold that the federal common law announced in *Lincoln Mills* preempted state law, but only after finding that it would be impossible for the two schemes to co-exist. The Court therefore concluded that *Congress* must have intended to preempt local law:

> "[W]e cannot but conclude that in enacting § 301 *Congress intended* doctrines of federal labor law uniformly to prevail over inconsistent local rules."
>
> 369 U.S. at 104 (emphasis added)

In a related area this Court has emphasized that the question of ouster of state statute and common law is a question best left to Congress and not the courts. *Miree* v. *DeKalb County, Georgia,* 433 U.S. 25, 32 (1977); *Wallis* v. *Pan American Petroleum Corp.,* 384 U.S. 63, 68 (1966).

Professor Paul Mishkin, a long time advocate of federal judicial power to formulate interstitial federal common law, has voiced constitutional concerns about judicial ouster of state law without express congressional intent:

> "I maintain that the Constitution bears not only on congressional power but also imposes a distinctive, independently significant limit on the authority of the federal courts to displace state law.
>
> * * *
>
> That Congress may have constitutional power to make federal law displacing state substantive policy does *not* imply an equal range of power for federal judges. Principles related to the separation of powers impose an additional limit on the authority of federal courts to engage in lawmaking on their own (unauthorized by Congress)."
>
> Mishkin, *Some Further Last Words on Erie—The Thread,* 87 Harv. L.Rev. 1682, 1683 (1974) (emphasis in original)

C. The Constitutional Mandate Of *Erie* That State Law Govern The Determination Of Rights With Their Source in State Law Is Consistent With The Court's Decision In *Illinois* v. *Milwaukee*

Footnote 5 of Justice Douglas' opinion in *Illinois* v. *Milwaukee* cites a lengthy passage from *Lincoln Mills* that many argue reflects a preemption of state law. 406 U.S. at 103 n.5. But *Lincoln Mills* and other interstitial federal common law cases did not address preemption of state law and are readily reconciled with the *Erie* mandate followed in *Ohio* v. *Wyandotte.*

In *Lincoln Mills* the Court, first having found that the source of the substantive right being asserted had its basis in federal law (i.e., the congressional purpose to provide substan-

tive legal remedies), then held that "*Federal* interpretation of the *federal law* will govern, *not state law.*" 353 U.S. at 457 (emphasis added).

This basic rule—that federal law, not state law, governs the interpretation of rights to relief based on substantive federal law—is dictated by the Supremacy Clause of the Constitution. However, the constitutional converse is also true. The scope and meaning of rights based on state substantive law must be based on state law—not some federal "common" law. This was the basic holding of *Erie* v. *Tompkins* in 1938 and the counterpart decision of this Court in 1939 in *Board of Commissioners of Jackson County* v. *United States,* 308 U.S. 343 (1939).

Board of Commissioners was decided soon after *Erie* and illustrates the distinction very well. There the Court undertook a multi-step analysis. The Court first determined that the right being asserted had its basis in federal law. 308 U.S. at 349. The Court then determined that Congress had neglected to provide a remedy for that right and had left the remedy to judicial implication. *Id.* The Court then applied the corollary of *Erie's* constitutional mandate: "Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is ultimately attributable to the Constitution, treaties or statutes of the United States, *and does not owe its authority to the law-making agencies of Kansas. Cf. Erie R. Co.* v. *Tompkins,* 304 U.S. 64, 58 S.Ct. 817, 82 L.Ed. 1188, 114 A.L.R. 1487." *Id.* at 349-50 (emphasis added).

Having decided that the rule of decision was federal law, the Court went on to emphasize that nothing in state law could be used to defeat that federal right. *Id.* at 350. This holding was totally consistent with the Supremacy Clause. However in the interests of federal/state comity, the Court held that the local law on payment of interest would be "absorbed" into the federal law.

> "With reference to other federal rights, the state law has been *absorbed,* as it were, as the governing federal rule *not*

> *because state law was the source of the right but because recognition of state interests was not deemed inconsistent with federal policy."*
>
> *Id.* at 351-52

The case that clarifies the distinction between choice of law where the right asserted has its source in federal law and choice of law when the right asserted has its source in state law is *Guaranty Trust Co.* v. *York,* 326 U.S. 99 (1945):

> "We put to one side the considerations relevant in disposing of questions that arise *when a federal court is adjudicating a claim based on a federal law.* See, for instance, *Board of Com'rs* v. *United States,* 308 U.S. 343, 60 S.Ct. 285, 84 L.Ed. 313; *Deitrick* v. *Greaney,* 309 U.S. 190, 60 S.Ct. 480, 84 L.Ed. 694; *D'Oench, Duhme & Co.* v. *F.D.I.C.,* 315 U.S. 447, 62 S.Ct. 676, 86 L.Ed. 956; *Clearfield Trust Co.* v. *United States,* 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838; *O'Brien* v. *Western Union Telegraph Co.,* 1 Cir., 113 F.2d 539. Our problem only *touches transactions for which rights and obligations are created by one of the States,* and for the assertion of which, in case of diversity of the citizenship of the parties, Congress has made a federal court another available forum."
>
> 326 U.S. at 101 (emphasis added)

Against this background, Justice Douglas' footnote 5 at 406 U.S. at 103 takes on its appropriate meaning. Justice Douglas had found his source of federal right and federal concern in the panoply of federal statutes which impacted water pollution control. 406 U.S. at 101-02. However, since the federal laws in this area did not give the specific remedy sought by Illinois, Justice Douglas created a federal "common law" remedy which filled in the interstices left by the federal statutes in the area. *See Board of Commissioners, supra; Deitrick, supra; D'Oench, supra.*

Since the source of the federal remedial right created as an interstitial remedy was based on the federal statutes, federal not state law must govern the interpretation of that right. *Board of*

Commissioners, supra. For the purpose of determining the outlines of that judge-made federal common law, state law could be absorbed but was not binding on the determination of that federal common law right.

Footnote 5 of *Illinois* v. *Milwaukee* does not discuss the law to be applied where as here, claims based on state law are also presented. The complimentary doctrine of *Erie* and *Board of Commissioners* provide a clear rationale for applying federal principles and "absorbed" state law to the articulation of the federal right, and for applying state law for decision of the state right under *Erie, Guaranty Trust* and *Ohio* v. *Wyandotte.*

D. The Law Applied In Suits By One State Against Another State Does Not Apply To Interstitial Federal Common Law.

In suits between sovereigns, state law is completely ousted and federal law must govern. *See, e.g., Kansas* v. *Colorado,* 206 U.S. 46 (1907); *Connecticut* v. *Massachusetts,* 282 U.S. 660 (1931). Illinois is in complete agreement with that principle and it is totally consistent with the special exclusive jurisdiction of the Supreme Court over direct suits between sovereigns. Just as state courts could not intrude upon the Supreme Court's original and exclusive jurisdiction so also the state law of any State cannot be imposed on the sovereign actions of another State. Here by definition the only choice of law is federal.

The principles of common law announced in these cases did not oust or preempt state law. Instead, by the constitutional definition of a dispute between sovereign States, state law was *constitutionally* preempted.

This automatic constitutional preemption of all state law in disputes directly between States would apply to all state law. Thus if the disputes were over taxes, contracts, torts, labor agreements or any other substantive subject matter, the Constitution dictates that in disputes directly between the sovereign States, the Supreme Court fashion federal law and no state law can constitutionally apply.

This specialized and essential constitutional ouster of state law in direct disputes between sovereigns is wholly consistent with *Erie* v. *Tompkins* and *Ohio* v. *Wyandotte.* Since the Constitution says federal law must govern to the exclusion of state law in direct disputes between sovereigns, it was wholly consistent for the author of *Erie* to also indicate the same day in *dicta* that federal common law governed disputes between the States. *Hinderlider* v. *La Plata River & Cherry Creek Ditch Co.,* 304 U.S. 92 (1938).

But that constitutional ouster has no meaning in suits between citizens of different States or between a State and a citizen of another State. Under those circumstances, *Erie* and *Ohio* v. *Wyandotte* mandate that the court—be it state or federal—apply the law which is the source of the substantive right being asserted.

E. Congress Has Not Preempted State Statutory And Common Law Remedies To Abate Water Pollution

The only remaining question is whether Congress expressed any intent to oust state law. If Congress intended to preserve state law, federal interstitial common law—based as it must be on congressional purpose—cannot constitutionally oust state law.

1. The Law of Preemption

At the heart of the preemption of state law issue are the basic principles of federalism calling for the sharing of power between the States and the national government:

> "... we start with the assumption that the historic police powers of the states will not be superseded by the Federal Act unless that is the clear and manifest purpose of Congress."
>
> *Rice* v. *Santa Fe Elevator Corp.,* 331 U.S. 218, 230 (1947)

The common sense constitutional roots of this careful diffusion of power have been described best by Professor Henry Hart:

> "We could have, in principle, a perfect uniformity of law in the United States—at a price. We could have it by establishing a single legislature, a single system of courts, a single chief executive, and a single phalanx of executive departments and administrative agencies, each possessing within its sphere a nation-wide and general jurisdiction.
>
> So Procrustean a solution of the problems of federalism is unlikely to find wide favor. . . . Common sense and the instinct for freedom alike can be counted upon to tell the American people never to put all their eggs of hope from governmental problem-solving in one governmental basket."
>
> Hart, *The Relations Between State and Federal Law,* 54 Colum. L. Rev. 489, 539-540 (1954)

The intent of Congress to preempt state law must be clear. ". . .[W]e are not to conclude that Congress legislated the ouster of this California statute by the marketing orders in the absence of an unambiguous congressional mandate to that effect. We search in vain for such a mandate." *Florida Lime & Avocado Growers, Inc.* v. *Paul,* 373 U.S. 132, 147 (1963). Absent such unambiguous intent the Court should not find preemption of state law. *New York State Department of Social Services* v. *Dublino,* 413 U.S. 405, 415 (1973).

2. Congressional Intent to Preserve State Law

Both the express language and the legislative history of the Federal Water Pollution Act Amendments of 1972 and 1977 show unmistakable congressional intent to preserve state law remedies.

Milwaukee has ignored Section 510 of the 1972 Amendments, which expressly allows a State or political subdivision to impose more stringent requirements:

> "*State authority*—Except as expressly provided in this Act, *nothing* in this Act *shall* (1) preclude or deny the right of any State or political subdivision thereof or interstate agency to adopt or enforce (A) *any standard or limitation*

respecting discharges of pollutants, or (b) *any requirement respecting control or abatement of pollution. . .*"

33 U.S.C. § 1370 (emphasis added)

With respect to this section, the House Public Works Committee stated:

> "The Committee considers section 510 to be of extreme importance in assuring the States of the right to adopt or enforce provisions at least as strict as those established in this legislation. Thus, *the Committee rejected in most instances suggestions for preemption by the Federal Government* and preempted the States only where the situation warranted it based upon the urgent need for uniformity such as in section 312(f) relating to marine sanitation devices."
>
> 1 Congressional Research Service, *A Legislative History of the Water Pollution Control Act Amendments of 1972,* 93d Cong. 1st Sess. 823 (1973) (hereinafter cited as "Legislative History") (emphasis added)

Since the passage of the 1972 Amendments, the courts have uniformly recognized the rights of States to require more stringent requirements than the national standards.[14] Nor did Congress in any way seek to restrict this right to more stringent standards in the 1977 Amendments. In the Senate Report on the 1977 Amendments, the Senate Public Works Committee states:

---

[14] *United States Steel Corp.* v. *Train,* 556 F.2d 822, 839 (7th Cir. 1977); *Mianus River Preservation Comm.* v. *E.P.A.,* 541 F.2d 899, 906 (2d Cir. 1976); *Metropolitan Sanitary District* v. *United States Steel Corp.,* 30 Ill. App. 3d 360, 332 N.E.2d 426, 434 (1975), *cert. denied,* 424 U.S. 976 (1976); *People ex rel. Scott* v. *United States Steel Corp.,* 40 Ill. App. 3d 607, 352 N.E.2d 225, 229 (1976); *United States ex rel. Scott* v. *United States Steel Corp.,* 356 F.Supp. 556, 558-59 (N.D. Ill. 1973); *Illinois* v. *City of Milwaukee,* 366 F.Supp. 298 (N.D. Ill. 1973); *Cf. Village of Glencoe* v. *Metropolitan Sanitary District,* 23 Ill. App. 3d 868, 320 N.E.2d 524 (1974).

> "There is nothing in these new provisions which in any way preempts the rights of States to have more stringent water quality standards or associated effluent limitations; . . ."
>
> S. Rep. No. 370, 95th Cong. 1st Sess. 43 (1977) 4 *Legislative History,* 676

Just as States were entitled to require more stringent discharge requirements under the Act, so also their various pre-existing common law and statutory remedies were preserved. Section 505 creates a specific statutory cause of action for any citizen to enforce any effluent limits imposed by the Act. By its express terms the cause of action created by Section 505 is limited to enforcing the specific limits set under the FWPCA. Section 505 does not create any right to enforce obligations which are not in the Act and common law nuisance claims are not § 505 actions. *Stream Pollution Control Board* v. *United States Steel Corp.,* 512 F.2d 1036, 1041 (7th Cir. 1975).

Congress clearly stated that Section 505 did not bar any other action which might exist under state common law or statute. Section 505(e) of the 1972 Amendments states:

> "(e) *Nothing* in this section *shall restrict any right* which any person (or class of persons) may have *under any statute or common law* to seek enforcement of any effluent standard or limitation or *to seek any other relief* (including relief against the Administrator or a State agency)."
>
> 33 U.S.C. § 1365(e)

The House Report on the 1972 Amendments states:

> "Subsection (e) provides that the right of persons (or class of persons) to seek enforcement or other relief under any statute or common law is not affected."
>
> 1 *Legis. Hist.* 821

F. Congress Was Aware Of Court Decisions That The 1972 FWPCA Amendments Had Not Preempted *Federal* Common Law. With This Knowledge It Rejected Attempts To Preempt Both The Federal Common Law And The Result In This Case

Given the clear intent of Congress that state statutory and common law remedies be preserved, the Court need not reach the question of the continued survival of a *federal* common law remedy which would fill in the interstices of the federal Act as now constituted. Nevertheless, the continued existence of a "*federal*" common law nuisance power is extremely necessary and useful. It is this federal common law nuisance authority which fills the gaps that Congress did not forsee or the agency could not address. For these reasons, and not as necessary to the determination of this case, the Court should declare the continuing vitality of federal common law power.

An examination of the legislative history of the 1972 and 1977 Amendments clearly establishes that Congress has not preempted "federal" common law. Congress had a detailed analysis of the federal common law of nuisance and the lower court cases applying it when it adopted the 1977 amendments, P.L. 95-217. By 1977, several cases, including a reported decision in this case (366 F.Supp. 298; Pet. App. G-1 *et seq.*) had considered and rejected the argument that the 1972 amendments preempted *federal* common law claims. *See e.g., Board of Supervisors of Fairfax County, Virginia* v. *United States,* 408 F.Supp. 556, 562 (E.D. Va. 1976); *United States* v. *Ira S. Bushey & Sons, Inc.,* 346 F.Supp. 145, 149 (D. Vt. 1972); *United States ex rel. Scott* v. *United States Steel,* 356 F.Supp. 556, 559 (N.D. Ill. 1973); *United States* v. *Ira S. Bushey & Sons, Inc.,* 363 F.Supp. 110, 120 (D. Vt.), *aff'd,* 487 F.2d 1393 (2d Cir. 1973), *cert. denied.,* 417 U.S. 976 (1974).

Congress knew that these cases had construed the 1972 amendments as preserving a *federal* common law of nuisance. While Congress was considering the 1977 amendments, the Congressional Research Service of the Library of Congress compiled the significant decisions which had construed the 1972 Act during the preceding five years.[15] The Library of Congress Report contains repeated, specific discussions of this very case:

---

[15] House Comm. on Public Works and Transportation, *Case Law Under the Federal Water Pollution Control Act Amendments of 1972,* 95th Cong., 1st Sess. (Comm. Print 1977) (hereafter *"Library of Congress Report"*).

> "...[A] federal district court in Illinios [sic] held that the Act *does not preempt* a State action in federal court based on *federal* common law and seeking abatement of a nuisance. *Illinois* v. *City of Milwaukee,* 366 F.Supp. 298 (N.D.Ill. 1973)."
>
> *Library of Congress Report* at 3 (emphasis added)

In discussing cases which had construed Section 505 there was an entire section addressed solely to *federal* common law nuisance actions. *Library of Congress Report* at 106-07.

Finally, in the discussion of case law under Section 510 and its preservation of state authority, the Congressional Research Service again referred to this case, and explained to Congress in plain, unequivocal terms that the lower courts had construed the 1972 amendments as preserving *federal* common law:

> "In *Illinois* v. *City of Milwaukee,* 366 F.Supp. 298 (N.D.Ill. 1973), *the court held that neither the Act nor the E. P. A. regulations governing waste discharges and water quality barred a suit by the State of Illinois seeking to enjoin as a nuisance a Wisconsin city's alleged discharge of raw sewage into Lake Michigan.* The court relied in part on Section 510 in finding that the Act was not intended to terminate a state's right to invoke the federal common law of nuisance. *Accord United States* v. *United States Steel,* 356 F.Supp. 556 (N. D. Ill. 1973) (both the Federal Government and the State of Illinois may rely on federal common law of nuisance.) *See E. P. A.* v. *California,* 426 U.S. 200 (1976), discussed under Section 505."
>
> *Library of Congress Report* at 123 (emphasis added)

Contrary to Milwaukee's unsupported assertion that Congress passed two major statutes in a state of blissful ignorance, the legislative history is clear that Congress knew exactly what it was doing, meant exactly what it said, and fully intended to

preserve the common law, including the *federal* common law. It kept Sections 505(e) and 510 unchanged in the 1977 amendments.[16]

IV

THE DISTRICT COURT PROPERLY HELD THAT FEDERAL LAW GOVERNS THE FEDERAL COMMON LAW CLAIM IN COUNT I AND THAT STATE LAW GOVERNS THE STATE STATUTORY AND STATE COMMON LAW CLAIMS IN COUNTS II AND III.

The complaint in this case has three separate counts: a) Count I charged Milwaukee with the creation of a federal common law nuisance; b) Count II charged Milwaukee with violation of statutory prohibitions against water pollution contained in the Illinois Environmental Protection Act, Ill. Rev. Stat., ch. 111½ § 1001 *et seq.;* and c) Count III charged Milwaukee with the creation of a common law nuisance under

---

[16] Further, in 1977 Wisconsin Congressman Les Aspin made a last-ditch attempt to overturn this very case and these constructions of the 1972 amendments and to severely limit the availability of all common law nuisance actions. Following the decision in the District Court in this case, but before the entry of judgment, Representative Aspin attempted to introduce an amendment to the bill which became the 1977 amendments. This amendment is reproduced in full in a separate Appendix, as are letters from Senator Stevenson and the Department of Justice expressing opposition to the Aspin amendment [Ill.App. 98a-103a]. The Aspin amendment would have amended Section 402—the Section dealing with discharge permits under the Act—and prevented a State and its citizens from bringing a common law nuisance action unless the State first participated in the administrative permit process. It would have applied even to pending cases unless a "final decision" had been rendered.

As Senator Stevenson's letter to Senator Randolph pointed out, the Aspin amendment—with its "final decision" language—was plainly directed at the District Court decision against Milwaukee in this case: it came in October, 1977, *after* the court announced its decision (July, 1977) but *before* the entry of judgment (November, 1977). Significantly, Congress did not adopt it. Having failed in Congress, Milwaukee is now asking the Court to adopt a judicial version of the Aspin amendment.

Illinois law. The District Court found liability on all three counts. (Pet. App. F-24.) The analysis set forth above clearly demonstrates that the judiciary in declaring *interstitial* federal common law—grounded on fulfillment of a legislative purpose—has no constitutional power to oust concurrent state statutory and common law rights where Congress has so unequivocally stated its intent to preserve such state remedies.

Since there is no preemption of any state statutory or common law claims, *Erie* and *Guaranty Trust* mandate that state law determine the state law counts and that federal law determine the federal law count.

V

THE EVIDENCE BEFORE THE TRIAL COURT BELOW OVERWHELMINGLY DEMONSTRATES MILWAUKEE'S LIABILITY FOR CONTAMINATING ILLINOIS WATERS OF LAKE MICHIGAN UNDER THE FEDERAL COMMON LAW, THE STATE COMMON LAW AND THE ILLINOIS ENVIRONMENTAL PROTECTION ACT.

Milwaukee has taken snatches of the District Court's findings and concocted a series of evidentiary claims that have little relationship to reality. It is sufficient to note that each of Milwaukee's evidentiary arguments was exhaustively examined by the Court of Appeals and rejected. Both the District Court and the Court of Appeals found clear and convincing evidence of Milwaukee's liability (Pet. App. F-15; F-23; A-27).

Given the detailed findings by the District Court (Pet. App. F-1 to F-30), the detailed analysis of the testimony and evidence by the Court of Appeals (Pet. App. A-26 to A-39; B-1 to B-32), the "two-court" rule applied in *Berenyi* v. *District Director, Immigration & Naturalization Service,* 385 U.S. 630, 636 (1967) and *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co.,* 336 U.S. 271, 275 (1949) should be applied here. This Court "cannot undertake to review concurrent findings of

fact by two courts below in the absence of a very obvious and exceptional showing of error". *Graver Tank & Manufacturing Co.* v. *Linde Air Products Co., supra,* 336 U.S. at 275.

Milwaukee repeatedly cites *New York* v. *New Jersey,* 256 U.S. 296 (1921), and *Missouri* v. *Illinois,* 200 U.S. 496 (1906), as if the facts in those situations were identical to those in the instant case. But in each of those cases the plaintiff State was allowing its own dischargers to discharge equal or greater amounts of sewage into the same watercourse, contaminating the same water:

> "Where as here, the plaintiff has sovereign powers and *deliberately permits discharges similar to those of which it complains,* it not only offers a standard to which the defendant has the right to appeal, but *as some of those discharges are above the intake of St. Louis,* it warrants the defendant in demanding the strictest proof that the plaintiff's own conduct does not produce the result, or at least so conduce to it that courts should not be curious to apportion the blame."
>
> *Missouri* v. *Illinois,* 200 U.S. 496, 522 (1906) (emphasis added)

In *New York* v. *New Jersey,* the complaining State allowed New York City to dump into the same waters seven times the volume of sewage (all untreated) as the proposed New Jersey discharge which was treated. 256 U.S. at 303. Here, by contrast, Illinois has either completed or has under construction programs which have already eliminated or will eliminate all uncollected and untreated sewage discharges to Lake Michigan.

VI

WISCONSIN'S ABATEMENT REQUIREMENTS CONTINUE TO BE PLAGUED BY LACK OF SPECIFIC COMMITMENTS AND LACK OF PRECISE DEADLINES.

A. Wisconsin's Pollution Control Requirements

From the time this controversy began thirteen years ago, the abatement requirements imposed on Milwaukee by Wisconsin state agencies have been characterized by vague unenforceable discharge limitations and indefinite open-ended deadlines. This problem was not solved by the passage of the Federal Water Pollution Control Act Amendments of 1972 (P.L. 92-500).

The 1972 Amendments mandated nationwide "technology-based" minimum effluent limitations for all sources on a uniform basis across the country. To protect clean high quality waters like Lake Michigan from being degraded down to some common denominator based on the technology-based nation-wide minimum, the House insisted on the inclusion of § 303 of the Act—the adoption of ambient water quality standards and the development of more stringent effluent limitations to meet those water quality standards.

These water quality standards for high quality waters were to be translated into effluent limitations through the procedures established by § 303(d) which required the states to identify those waters where the technology-based effluent limitations of § 301(b)(1)(A) and § 301(b)(1)(B) "*are not stringent enough* to implement any water quality standards ..." § 303(d)(1)(A). Section 303(d)(1)(C) then required the states to set a more stringent "total maximum daily load of pollutants" allowed to be discharged which would insure attainment of the water quality standards with a "margin of safety." § 303(d)(1)(C). These total maximum daily loads were then allocated by means of a waste load allocation among the various discharge points which were to be incorporated into point source permits as effluent limitations under § 301(b)(1)(C). R. Zener, *Water Pollution Control, in Federal Environmental Law*, 719 (1974).

In the eight years since the passage of the 1972 Amendments, Wisconsin has failed to impose effluent limitations which will insure the achievement of the public health water quality

standards it has adopted for Lake Michigan.[17] Permits issued to Milwaukee by the State of Wisconsin since 1972 continue to lack specific enforceable requirements and contain open-ended deadlines with respect to both the separate sanitary sewer system overflows and combined sewer overflows.

Separate Sanitary Sewer System Overflows. In 1974, Milwaukee was given until December 31, 1975 to produce a "plan" for "the *elimination* of all discharge points noted above" (JA 379, 416, 426). The "plans" were never submitted and no deadline has ever been set for the elimination of these points. In 1977, a Stipulation signed between Wisconsin and Milwaukee contained strong and clear prefatory language[18] but the actual obligation is much weaker. The obligation is only to "correct" *wet* weather discharge—not *dry* weather discharges. Moreover, there is no commitment to eliminate the discharges or meet secondary treatment standards by any date (JA 470).

In 1978 Wisconsin issued other permits for these separated sewer overflows which expressly state that the 1977 stipulation is not a part of the permits. (Ill. App. 50a). These permits specifically mandated "elimination" of these overflows or treat-

---

[17] Wisconsin has set a water quality standard for Lake Michigan which states that the water quality for Lake Michigan shall be suitable for recreational use and as a public water supply and that the following criteria shall apply to protect that use: 1) "[s]ubstances in concentrations which are toxic or *harmful to humans* shall not be present in amounts found *to be of public health significance* . . ." NR 102.02; 2) a bacteriological criterion is set as: "[t]he membrane filter fecal coliform count shall not exceed 200 per 100 ml as geometric mean nor exceed 400 per 100 ml in more than 10% of all samples during any month." NR. 102.02; 3) as to public water supply the Wisconsin standards state "concentrations of other constituents *must not be hazardous to health.*" NR 102.02. (emphasis added) (compiled in BNA *Environment Reporter, State Water Laws,* Vol. 2, pp. 951: 1002-03.)

[18] "WHEREAS, the Department alleges that under *dry* weather and *wet* weather conditions, bypassing and overflowing occur within the sewerage systems of the Commissions and such discharges must *either be eliminated or meet secondary treatment standards* by July 1, 1977."

(JA 463) (emphasis added)

ment to specific secondary effluent limits with a specific limit on bacteria. (Ill. App. 57a, 79a). However, the July 1, 1977 deadline set in the permit is wholly fictitious; the permit was issued in 1978. The pollution control work has not been done and there is no future enforceable deadline.

Combined Sewer Overflows. In its 1974 permit, the sole requirement for the CSO overflows was for Milwaukee to:

> "... *initiate* a program *leading* to the attainment of control of overflows from the City's combined sewer system ... *to assure attainment of all applicable Water Quality Standards.*"
>
> (JA 461) (emphasis added)

No effluent limitations of any kind have ever been established for these CSO overflows. There were no technology-based effluent limits imposed under § 301(b)(1)(A) or § 301(b)(1)(B) in the 8 years since the passage of the 1972 amendments. Nor have any water quality based effluent limitations ever been imposed to assure the attainment of all applicable water quality standards as required by § 303(d) and § 301(b)(1)(C).

The 1977 Stipulation (JA 461) is even weaker than the 1974 permit. The Stipulation contains an obligation to achieve "applicable water quality standards" by 1993. However, no effluent limitations are established and in the absence of federal funds, the Commission can delay completion indefinitely. The current estimate given by Milwaukee is completion after the year 2020.

In the 15 years since the passage of the 1965 Federal Water Pollution Control Act, the Wisconsin authorities have paid lip service to requiring the achievement of water quality standards without ever once imposing specific discharge

requirements on the CSO overflows.[19] Yet the violation of these water quality standards is rampant:

> "All in all, it is apparent that *pollution of the surface waters from human sources is tremendous.* Defendants' Draft Facilities Plan (Pl. Ex. 35, at 12). (emphasis added)
>
> * * *
>
> Failure to implement a solution to the problem will cause the continuation of sanitary sewage-related health hazards resulting from the introduction of untreated or inadequately treated sanitary sewage to the surface waters, . . ."

Id. at 279.

Milwaukee has represented to this Court that its pollution abatement program will achieve water quality standards—as required by § 301(b)(1)(C). Yet in a Facility Plan published in February 1980, Milwaukee's Consulting Engineer admitted its Combined Sewer Abatement project will continue to cause water quality standards violations for fecal coliform—the indicator organism for pathogenic bacteria. (Milwaukee Metropolitan Sewerage District, *Combined Sewer Facility Plan* (February, 1980) (hereafter "Facility Plan") p. 6B-190, 6B-193).

The Milwaukee 1980 Facility Plan showed that a complete sewer separation would insure elimination of the water quality standard violations:

---

[19] Nor would addressing these problems be simply a matter of challenging Wisconsin's WPDES permit in Wisconsin state courts or in the federal appellate court under § 509. A prerequisite to permit obligations is compliance with § 303 which would have necessitated lengthy litigation in the District Court. *See United States Steel Corp.* v. *Train,* 556 F.2d 822, 836-37 (7th Cir. 1977); *Bethlehem Steel Corp.* v. *Train,* 538 F.2d 513, 517 n.10 (2d Cir. 1976).

This is essentially the same administrative exhaustion issue which Milwaukee argued in 1971, since the water quality standard (§ 303(c)), maximum daily load (§ 303(d)), and § 301 (b)(1)(C) procedure is virtually the same as the water quality standard /implementation plan requirements of § 10 of the Federal Water Pollution Control Act Amendments of 1965, P.L. 89-234. In 1972 the Court *sub silentio* rejected this identical argument.

> "Complete sanitary separation completely eliminates all FC [fecal coliform] violations due to the CSO."
>
> Facility Plan, p. 60-19
>
> * * *
>
> "The resolution cits [sic] the following advantages of sewer separation over other considered alternatives: ... Least capital cost ... Lower operation and maintenance cost ... Assures minimal risk to the environment ... Removes all human fecal waste from area waterways."
>
> Facility Plan, p. 7-11

This lower cost, completely effective means of achieving water quality standards was never presented to the District Court. As soon as this Court granted certiorari Milwaukee terminated all discussions about low cost alternatives which would achieve water quality standards.

B. Wisconsin Permits Are Not a Defense

Milwaukee seeks to justify the weakness of the Wisconsin abatement requirements through a number of procedural ploys. First, Milwaukee's compliance with these open-ended vague Wisconsin obligations is not a defense to claims under federal and state nuisance law. Section 402(k) states that a state NPDES permit shall be a defense to actions brought under § 309 (action by United States) or § 505 (action by private citizens) to enforce the Act. However, an action for nuisance is not a § 309 action nor a § 505 action. *See Stream Pollution Control Board* v. *United States Steel Corp.*, 512 F.2d 1036, 1041 (7th Cir. 1975). A permit by an administrative agency is no defense to a nuisance action.[20]

---

[20] *New Jersey* v. *City of New York*, 283 U.S. 473, 482-83 (1931). The law of most states, including Wisconsin and Illinois, is in accord. *See Costas* v. *City of Fond du Lac*, 24 Wis.2d 409, 129 N.W.2d 217, 220 (1964); *Landfill, Inc.* v. *Pollution Control Board*, 74 Ill.2d 541, 387 N.E.2d 258, 265 (1978); *People ex rel. Scott* v. *United States Steel Corp.*, 40 Ill.App.3d 607, 352 N.E.2d 225 (1976); *Venuto* v. *Owens-Corning Fiberglas Corp.*, 22 Cal.App.3d 116, 129, 99 Cal. Rptr. 350, 359 (1971); *State ex rel. Shevin* v. *Tampa Electric Co.*, 291 So.2d 45 (Fla. App. 1974); *Commonwealth ex rel. Schumaker* v. *New York & Pa. Co.*, 367 Pa. 40, 79 A.2d 439 (1951).

C. Illinois Permit Requirements Are As Strict As The Judgment Order

Next, Milwaukee argues that Illinois requires less stringent controls for separate sewer overflows and combined sewer overflows than Milwaukee must meet. Milwaukee is again wrong. As to separate sanitary sewer overflows, Illinois Pollution Control Board Rule 602 states that "[o]verflows from *sanitary* sewers are *expressly prohibited.*"

As to the combined sewer area, Illinois requires combined sewer discharges to achieve water quality standards as required by § 303(c) and § 301(b)(1)(C) of the federal Act. Contrary to Milwaukee's assertion Illinois cannot make these point sources exempt from the statutory obligations of § 303(c) and § 301(b)(1)(C). The *maximum* delay permitted under the Clean Water Act to meet water quality standards by municipalities is 1983 and that would require special permission from the EPA Administrator. § 301(i).

VII

"COST-EFFECTIVENESS" AS USED IN THE CLEAN WATER ACT MEANS THE LEAST RESOURCE COST TO ACHIEVE THE REQUIREMENTS OF THE ACT: "COST-EFFECTIVENESS" DOES NOT ALLOW MILWAUKEE TO VIOLATE WATER QUALITY STANDARDS UNDER § 301(b)(1)(C) AND § 303(c).

Milwaukee argues that the cost of achieving Wisconsin's water quality standards for Lake Michigan should allow Milwaukee to both avoid and delay its obligation in two ways:

1. Milwaukee argues that the Federal Act requires it to eliminate only those water quality standards violations that are "cost-effective" to eliminate; water quality standards violations which are not cost-effective to eliminate need not be eliminated no matter how degraded the Lake may be or how many violations continue.

2. Milwaukee argues that it only needs to eliminate these "cost-effective" water quality standards violations at its own financial convenience—even if its convenience means a 50 year completion schedule and despite the 1977 deadline contained in § 301(b)(1)(C). As a part of this argument, Milwaukee argues that the requirement to comply with § 301(b)(1)(C) depends on federal grant funds being available.

Milwaukee bases almost all of its arguments on Title II of the Federal Act—particularly the "cost-effective" language of § 212 and § 217. But § 212 and § 217 do not allow Milwaukee to continue water quality standards violations. Indeed § 212(2)(B) of the Act (Ill. App. 7a) specifically provides that federal grant funds shall be used to fund "the most cost efficient alternative to *comply with sections 301...*" (emphasis added). Section 212(2)(C) then mandates that the EPA publish guidelines for "cost-effective analysis".

The EPA has promulgated these guidelines which explicitly define cost-effective as being that alternative "which will result in the minimum resource costs over time" to meet federal requirements. 40 C.F.R. Part 35, Subpart E, Appendix A, ¶4b [43 Fed. Reg. 44807 (September 27, 1978)].

Thus "cost-effective" as used in the Clean Water Act and defined by EPA simply means the selection of that treatment system which will result "in the minimum resource costs over time" to meet § 301 requirements. In this case the § 301 requirement, § 301(b)(1)(C), is the effluent limitation "necessary to meet water quality standards".

There is no provision in the Federal Act for permitting a discharge to violate water quality standards adopted pursuant to § 303. There is a mechanism under the Act whereby high quality waters may be "downgraded" by downgrading the water quality standards to a lower level of water quality and lower beneficial use. 40 C.F.R. § 35.1550 (44 Fed. Reg. 30040 (May 23, 1979)). However, this downgrading procedure establishes a very rigorous mechanism for using economic difficulty as a justification for adopting reduced levels of water quality.

Officials in Wisconsin, Illinois and Milwaukee are fully aware of the enormous political reaction that would occur in those States if EPA attempted to approve a "downgrading" of Lake Michigan from a high quality full body contact recreational water to one that allowed no swimming or swimming at limited times only. No one has suggested or applied to downgrade the water quality standards for Lake Michigan.

The sewage agency *amici* and the General Accounting Office (GAO) want Congress to change the law to permit water quality standard violations. GAO has unleashed a barrage of highly publicized reports—including those mentioned by Milwaukee—which on analysis argue that achieving water quality standards is simply not worth the money. *See e.g.*, General Accounting Office, *Many Water Quality Standards Violations May Not Be Significant Enough To Justify Costly Preventative Actions,* CED-80-86 (July 2, 1980). GAO's other reports —such as its critique of Chicago's Deep Tunnel Plan—argue that elimination of water quality standards violations is not worth the cost and that the standards should be relaxed.

Congress has not changed the law. There has been no relaxation of § 303(c) (water quality standards must "protect the public health"); § 303(d) (maximum pollutant loads must be set at a level which insures achievement of water quality standards with "a margin of safety"); and § 301(b)(1)(C) (effluent limitations must achieve water quality standards); or the definition of cost-effective in § 212.

However, Milwaukee has seized upon an informal EPA memorandum for grant funding of combined sewer overflows as a basis to continue violating water quality standards. Program Requirements Memorandum, PRM 75-34 [formerly PG-61]. That memorandum adopts a dramatically different definition of "cost-effective" than that used in § 212. PRM 75-34 adopts a "marginal cost" approach to grant funding which will fund projects even though § 301(b)(1)(C) and § 303(c) water quality standards violations still occur.

Under this "marginal" approach to cost-effectiveness, the discharger need only eliminate those water quality standards where the "marginal" or incremental cost of removing each violation continues to decline. According to this approach, once the marginal costs begin to rise, grant funding stops—no matter how dirty the water or how many illegal water quality standards violations occur.

In its recent facility plan, Milwaukee makes a statement which vividly illustrates Milwaukee's definitional subterfuge.

> "The *cost effective* solution required by the EPA [under PRM 75-34] is *not* necessarily the *cost effective* solution *required to attain water quality standards* [§ 301(b)(1)(C), § 212]. To achieve these standards *additional measures may be required.*"
>
> *Facility Plan,* 3-1 (emphasis added)

Milwaukee wants this Court to give it what it failed to get from Congress. By substituting their own definition of cost-effective in place of that used by Congress, Milwaukee and the sewage agency *amici* hope to obtain from this Court a judicial amendment to the Clean Water Act, giving judicial approval to "cost-effective" violations of water quality standards in violation of § 301(b)(1)(C) and § 303(c) of the Act. This dispute is best left to Congress. If Congress wants to change the law to permit "cost-effective" water quality standards violations, that decision belongs to Congress, not to this Court.

VIII

THE COST TO MILWAUKEE WAS CONSIDERED BY THE COURTS BELOW EVEN THOUGH THE DOCTRINE OF BALANCING DOES NOT APPLY WHEN A PUBLIC HEALTH NUISANCE IS INVOLVED

Milwaukee has made much of the purported cost of the facilities ordered by the District Court. Milwaukee was allowed to present extensive evidence on costs at trial (testimony of Richard Heaps, a financial analyst for Milwaukee, TR. 10838-

11122). Heaps testified that the average cost to a homeowner to meet Milwaukee's obligations if *no* federal funds were available was $5.47 per month. If federal funds are available the cost is $1.04 per month. (D. Ex., item 13; TR 11039-11040). Milwaukee's 300 million dollar claim has no foundation in the record and is based on Milwaukee's illegal "cost effective water quality standards violations" theory.

The law is clear that the courts will not allow a public health hazard to persist on a claim of economic inconvenience. In *People* v. *City of Port Huron,* 305 Mich. 153, 9 N.W.2d 41 (1943), the Michigan Supreme Court affirmed an order to Port Huron to build a sewage treatment plant. The Michigan Supreme Court refused to balance equities or comparative convenience in cases of public health:[21]

> "Even if we should concur with the trial judge in his conclusion that 'a balancing of equities' favors the city, this is not a proper case for the application of that doctrine. The doctrine of 'comparative injury' should be confined to those situations where the plaintiff can be substantially compensated. . . .
>
> "The doctrine of 'comparative injury' should not be invoked to justify the continuance of an act that tends to impair public health."
>
> 9 N.W.2d at 43

The need for Milwaukee to meet the costs of abating its nuisance discharge to Lake Michigan is amply illustrated by the lengthy litigation in *Wisconsin* v. *Illinois,* 289 U.S. 395 (1933). There, the Metropolitan Sanitary District of Greater Chicago and the State of Illinois were required to spend enormous sums to build huge sewage treatment plants. The fiscal convenience of defendants was not balanced against the need to remove the obstruction:

---

[21] The court distinguished this Court's decision in *City of Harrisonville* v. *W.S. Dickey Clay Mfg. Co.,* 289 U.S. 334, 339 (1932), on the fact that the injury to the complainant W.S. Dickey Clay Co. was wholly financial and no public health hazard was involved. *See also Commonwealth ex rel. Schumaker* v. *New York & Pa. Co., supra* 79 A.2d at 444; *Board of Comm'rs of Ohio County* v. *Elm Grove Mining Co.,* 9 S.E.2d 813, 817 (W.Va. 1940).

> "It already has been decided that the defendants are doing a wrong to the complainants and that they must stop it. They must find out a way at their peril . . . It can base no defenses upon difficulties that it has itself created."
>
> *Wisconsin* v. *Illinois,* 281 U.S. 179, 197 (1930)

Three years later the Sanitary District and the State of Illinois were back before the Supreme Court. The defendants had been stalling in the construction of the ordered sewage treatment works and Wisconsin petitioned for enforcement.

> "Despite existing economic difficulties, the State has adequate resources, and we find it impossible to conclude that the State cannot devise appropriate and adequate financial measures to enable it to afford suitable protection to its people to the end that its obligation to its sister States, as adjudged by this Court, shall be properly discharged."
>
> 289 U.S. at 410

Clearly economic burdens, even where they do exist —which is doubtful here—cannot be used as an excuse to avoid abatement of a public health nuisance.

IX

THE DISTRICT COURT HAD *IN PERSONAM* JURISDICTION, AND VENUE WAS PROPER IN THE NORTHERN DISTRICT OF ILLINOIS

Milwaukee contends that the case should have been dismissed because the District Court was without *in personam* jurisdiction over the defendants and because venue was improper. These same arguments were rejected by both the District Court (Pet. App. H-1—H-4), and the Seventh Circuit Court of Appeals (Pet. App. A-4—A-6).

A. The District Court Had *In Personam* Jurisdiction

The District Court's jurisdiction over the person of a nonresident defendant is dependent upon the extra-territorial service statute of the forum State. Fed. R. Civ. P. 4(e). In this case the Illinois "long arm" statute, Ill. Rev. Stat. ch. 110, §§ 16

and 17, control. Section 17, which lists the actions of a defendant by which it submits to the jurisdiction of an Illinois court, includes "[t]he commission of a tortious act within Illinois."

The Illinois Supreme Court has squarely held that the long arm statute reflects a conscious legislative purpose to assert jurisdiction over nonresident defendants to the extent permitted by the due process clause. *Gray* v. *American Radiator & Standard Sanitary Corp.*, 22 Ill.2d 432, 176 N.E.2d 761, 763 (1961); *Nelson* v. *Miller,* 11 Ill.2d 378, 143 N.E.2d 673, 679 (1957), and that Section 17 reaches non-resident defendants who commit acts in other States which result in injury in Illinois. *Gray* v. *American Radiator & Standard Sanitary Corp., supra.*[22]

Despite this authoritative construction of the Illinois statute—and the finding by the Court of Appeals that "[e]ach year defendants pump into Lake Michigan millions of gallons of pathogen-containing sewage, which the district court found is sometimes carried into Illinois water and presents a substantial threat of harm to Illinois residents" (Pet. App. A-5)— Milwaukee nevertheless clings to untenable positions. It contends that: 1) its discharge of raw sewage and disease-causing organisms into Illinois waters does not constitute commission of a tortious act in Illinois, and 2) in any event, its discharge of contaminants into Illinois waters does not constitute a sufficient "minimal contact" with Illinois to support *in personam* jurisdiction.

1. Discharge of Pathogens Into Illinois Waters Con stitutes The Commission Of "A Tortious Act Within" the State of Illinois.

It is beyond dispute that Illinois' claims against Milwaukee, both federal and state, sound in tort. *Illinois* v. *City of*

---

[22] The *Gray* decision was recently cited with approval by this Court in *World-Wide Volkswagen Corp.* v. *Woodson,* ____ U.S. ____, 100 S.Ct. 559, 567 (1980).

Milwaukee, 406 U.S. 91 (1971); *Cf. Georgia* v. *Tennessee Copper Co.,* 206 U.S. 230, 237 (1907). *See also Prosser, Law of Torts* 573-583 (4th ed. 1971).

For purposes of the Illinois long arm statute, "a tort is committed in the place where the injury occurs." *McBreen* v. *Beech Aircraft Corp.,* 543 F.2d 26, 28 (7th Cir. 1976); *Honeywell, Inc.* v. *Metz Apparatewerke,* 509 F.2d 1137, 1142 (7th Cir. 1975); *Consolidated Laboratories, Inc.* v. *Shandon Scientific Co.,* 384 F.2d 797, 802 (7th Cir. 1967); *Gray* v. *American Radiator & Standard Sanitary Corp., supra.*

Illinois alleged and proved that as a result of Milwaukee's discharges of raw and untreated sewage, both the citizens of Illinois and the Lake Michigan territorial waters of Illinois sustained damage; and consequently for the purposes of jurisdiction there is no question but that Milwaukee's conduct constituted the commission of "a tortious act within" Illinois.

2. The Contacts Between Illinois And Milwaukee Are Sufficient To Support *In Personam* Jurisdiction.

Milwaukee's argument comes 100 years too late. In the era of *Pennoyer* v. *Neff,* 95 U.S. 714 (1878), attempts by states to exercise jurisdiction over persons outside of their territorial limits were invalid. This archaic doctrine and the conceptual framework which supported it have been rejected. *International Shoe Co.* v. *Washington,* 326 U.S. 310 (1945); *Shaffer* v. *Heitner,* 433 U.S. 186 (1977). The relevant inquiry is whether the actions of the defendant establish "certain minimum contacts with [the forum State] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice'" [citation omitted]. *International Shoe, supra* 326 U.S. at 316.

This Court has addressed this question in the context of interstate and international water pollution in *Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. 493 (1971). Deciding that Ohio state courts could exercise jurisdiction over Michigan and Canadian defendants on claims arising under state common law nuisance, the Court said:

> "The courts of Ohio, under modern principles of the scope of subject matter and *in personam* jurisdiction, have a claim as compelling as any that can be made out for this Court to exercise jurisdiction to adjudicate the instant controversy . . . ."
>
> 401 U.S. at 500.[23]

Nothing in this Court's recent decision in *World-Wide Volkswagen Corp.* v. *Woodson,* ____ U.S. ____, 100 S.Ct. 559 (1980), suggests any different conclusion than that reached by the two courts below and by this Court in *Ohio* v. *Wyandotte.* In *World-Wide Volkswagen,* respondents sought to ". . . base jurisdiction on one, isolated occurrence and whatever inferences can be drawn therefrom . . ." *Id.* at 568.

Here, by contrast, Milwaukee has engaged in a continuous and purposeful course of conduct—discharging raw and untreated sewage into the interstate waters of Lake Michigan—for a period of time that stretches across decades and continues to this very date. It was both foreseeable and expectable by Milwaukee that Illinois waters and Illinois citizens would suffer damage as a result of Milwaukee's intentional tortious conduct.

The propriety of the District Court's exercise of *in personam* jurisdiction is confirmed by the strength of the State of Illinois' interest in the case. Illinois has enacted special legislation—the Illinois Environmental Protection Act, Ill. Rev. Stat. ch. 111½, § 1001, *et seq.*—to protect the environment and the public health and welfare. Section 12(a) of the Act which provides the basis for Count II of Illinois' complaint, specifically protects and provides redress for Illinois victims who are injured as a result of contaminants discharged in other States. The prior decisions of this Court establish that this expression

---

[23] *See* Currie, *Enforcement under the Illinois Pollution Law,* 70 Nw. U.L.Rev. 389, 394-95 (1975). After *Ohio* v. *Wyandotte,* the constitutionality of extra-territorial service under the Illinois long arm statute of complaints against out of state pollution sources "is no longer in doubt."

by the State of Illinois of its "manifest interest" in providing effective redress for citizens who have been injured by nonresidents engaged in an activity that the State treats as exceptional and subjects to special regulation furnishes strong support—if not a separate basis—for the exercise of *in personam* jurisdiction over Milwaukee. *McGee* v. *International Life Insurance Co.*, 355 U.S. 220, 223 (1957); *Hanson* v. *Denckla*, 357 U.S. 235, 252-53 (1958); *Kulko* v. *Superior Court*, 436 U.S. 84, 98 (1978).

Under these circumstances, it is neither unfair nor unreasonable to require Milwaukee to defend its conduct in a federal forum located within Illinois.

B. Venue Was Proper In The Northern District of Illinois

Venue is governed by 28 U.S.C. § 1391(b), which permits suit in *either* the "judicial district where all defendants reside, or in which the claim arose . . . ." The Court's 1972 opinion in this case noted that this provision gives "flexibility" to venue in this case. *Illinois* v. *Milwaukee, supra*, 406 U.S. at 108 n.10. The District Court below found that Illinois' claim arose in the Northern District of Illinois where the injury occurred, and held that venue was proper (Pet. App. H-3—H-4), and the Court of Appeals affirmed (Pet. App. A-6).

1. Illinois' Claims Are "Transitory" Actions

The first issue raised by Milwaukee is whether Illinois' claims—including the federal common law of nuisance—are "transitory" or "local" in nature. Milwaukee has taken the position that the claims are inherently local and must be brought in the judicial district where the municipal corporation is situated.

When this case was previously before this Court, this issue was resolved conclusively against Milwaukee. The Court explicitly ruled that the venue of a claim predicated on the federal common law of nuisance was a federal question governed by 28 U.S.C. § 1391(b); 406 U.S. at 108, n.10 (Pet. App.

I-17).[24] Therefore, by implication, the cause of action is necessarily transitory:

> "Section 1391(b) is the general venue statute governing *transitory* causes of action in federal courts where jurisdiction does not depend on diversity of citizenship."
>
> *Denver R.G.W.R. Co.* v. *Brotherhood of Railroad Trainmen,* 387 U.S. 556, 558 (1967) (emphasis added)

The historical background underlying the distinction between "transitory" and "local" actions is aptly summarized as follows:

> "At the early common law all actions had to be brought in the county in which the events occurred, because those who served as jurors were expected to decide the cases on the basis of their own knowledge of the facts. But with the transition to the present method of proving facts by the introduction of evidence the necessity for trying the case where the cause of action arose ceased to exist. Accordingly, a fiction developed by which the plaintiff would allege that his cause of action had accrued in the county where he brought suit. This allegation became nontraversable in most cases, and such actions were called 'transitory;' those for which it remained traversable were called 'local'."
>
> Note, *Local Actions in the Federal Courts,* 70 Harv. L.Rev. 708, 709-10 (1957)

---

[24] Because this suit involves a federal question and the issue of venue depends on federal law, *Leroy* v. *Great Western United Corp.*, ____ U.S. ____, 99 S.Ct. 2710, 2717 n.15 (1979), Milwaukee's reliance on cases involving applications of state law (*Markham* v. *City of Newport News, Va.,* 184 F.Supp. 659, 665 (E.D.Va. 1960); *Parks Co.* v. *City of Decatur,* 138 F. 550 (6th Cir. 1905)) and which were decided prior to 1966—when § 1391(b) was amended to provide flexibility and a choice of venue—is misplaced.

Moreover, the District Court ruling in *Markham* v. *City of Newport News, Va.,* 184 F.Supp. 659 (E.D.Va. 1960) relied on by Milwaukee was later reversed, 292 F.2d 711 (4th Cir. 1961). The Court of Appeals held that even in diversity cases the State of Virginia had no power to localize causes of action against municipal corporations by state statute and thereby oust competent federal courts from jurisdiction.

The unfortunate result of the federal recognition of "local" actions has been that "the federal court in the district where the defendant resides may be unable to hear the action while the court in the district where the property lies may be unable to acquire jurisdiction over the defendant." *Id.* at 708. Consequently, in many cases there has been a complete denial of justice. *See, e.g., Ladew* v. *Tennessee Copper Co.,* 218 U.S. 357 (1910); *Mississippi and M.R. Co.* v. *Ward,* 67 U.S. (2 Black) 485 (1863); *Livingston* v. *Jefferson,* 15 Fed. Cases 660 (No. 8411) (C.C. D. Va. 1811).[25]

---

[25] There is confusion even among eminent legal scholars as to the analytic distinction between "transitory" and "local" actions. Professor Moore has characterized the claims in *Ladew* and *Mississippi and M.R. Co.* as "transitory" actions, 1 Moore's Federal Practice, ¶ 0.142[2.-1], at 1366 & n.29; while Wright, Miller & Cooper have labeled the same claims "local," Wright, Miller & Cooper, 15 Federal Practice & Procedure § 3822, at 1316 n.31 (1976).

In *Ladew* the Court held that under the jurisdictional statutes then in effect a diversity action did not give the lower court personal jurisdiction over non-resident defendants, where no parties were residents of the federal district. Plaintiffs, citizens of New York and West Virginia, who owned property in Georgia and were allegedly injured by a mining operation in Tennessee owned by a New Jersey corporation, attempted to show that venue was proper in Tennessee because they could assert a claim to real property (the mining operation) in the district of Tennessee. The Court rejected this claim finding that "[i]n no just sense can their cause of action be said to constitute a claim to real property in the districts." At most, the case stands for the proposition that a nuisance action is not *in rem,* and therefore not local in nature.

In *Mississippi & M.R. Co.,* on the other hand, plaintiff sued *in rem* to abate as a nuisance a bridge over the Mississippi River, claiming that it interfered with the passage of his steam boats. The Court reversed an injunctive decree, stating that the Iowa district court had no *in rem* jurisdiction over the alleged nuisance, because the injury had occurred on the Illinois side of the river where the main channel of the stream lay. The Court expressly noted that *Ward* "asks nothing from the person of the defendant, but seeks to remove a local object," 67 U.S. (2 Black) at 494.

This Court has recognized the difficulties engendered by the "transitory"/"local" distinction and has narrowly limited the application of the "local" concept to actions that are *in rem*. *Casey* v. *Adams*, 102 U.S. 66, 67-68 (1880). Professor Moore is in full agreement with this limited application of the "local" action concept:

> "The true distinction between a local action and a transitory action is the distinction between an action *in rem* and one *in personam*. The character of the remedy sought should be determinative."
>
> 1 Moore's Federal Practice ¶0.142[2.1], at 1362-63

Measured against this standard, it is clear that Illinois' claims, which seek injunctive relief and pertain specifically to Milwaukee, are "transitory" actions.

2. Section 505 Of The Clean Water Act Is Inapplicable

Milwaukee next contends that Section 505 of the Clean Water Act places venue in the Eastern District of Wisconsin. By its very terms, however, Section 505 is inapplicable to this action:

> "Any action respecting a violation by a discharge source of an effluent standard or limitation or an order respecting such standard or limitation may be brought under this section only in the judicial district in which such source is located."
>
> 33 U.S.C. § 1365(c)(1).

This action was neither (a) respecting an effluent standard or limitation, nor (b) brought under the citizen suit provisions of § 505. *See Stream Pollution Control Board* v. *United States Steel Corp.*, 512 F.2d 1036, 1041 (7th Cir. 1975). The venue limitations of § 505(c) are simply irrelevant.

3. Illinois' Claim "Arose" In The Northern District Of Illinois

In its 1972 opinion in this case, this Court held that venue of Illinois' federal common law claim is governed by 28 U.S.C. § 1391(b) which permits suit in *either* the "judicial district where all defendants reside, or in which the claim arose." 406 U.S. at 108, n.10. The Court noted that the alternatives provided for in the statute give "flexibility to the choice of venue."

The determination of where "the claim arose" for purposes of federal venue under § 1391 is a federal question whose answer depends on federal law. *Leroy* v. *Great Western United Corp.*, ____ U.S. ____, 99 S. Ct. 2710, 2717, n.15 (1979). Under the federal common law of nuisance, this Court has held that an action arises in the place where the injury occurs. *Illinois* v. *Milwaukee,* 406 U.S. at 108, n.10; *Cf. Ohio* v. *Wyandotte Chemicals Corp.,* 401 U.S. at 500. *See also City of Evansville* v. *Kentucky Liquid Recycling, Inc.,* 604 F.2d 1008, 1020 n.36 (7th Cir. 1979).

Leroy v. *Great Western United Corp.,* ____ U.S. ____, 99 S. Ct. 2710 (1979), the case so heavily relied on by Milwaukee, does not compel any different conclusion. To the contrary, *Great Western* confirms the flexibility in § 1391 noted by this Court in its 1972 decision in this case, and supports the decision reached by the courts below.

In *Great Western,* the Court noted that if it is "not clear that the claim arose in only one specific district, a plaintiff may choose between those two . . . districts that with approximately equal plausibility may be assigned as the locus of the claim," 99 S. Ct. at 2718. In that case the Court found that there was "only one obvious locus . . . ." *Id.* Interstate water pollution suits such as this, however, plainly fall within the first category. *Illinois* v. *Milwaukee,* 406 U.S. at 108 n.10; *see City of Evansville* v. *Kentucky Liquid Recycling, Inc.,* 604 F.2d at 1020 n.36.

Venue was not only proper in the Northern District of Illinois—it was also best. Inasmuch as two of the three counts in Illinois' complaint were predicated on the law of the State of Illinois, the federal judges sitting in Illinois are better qualified to construe Illinois law than are judges sitting elsewhere. *Leroy* v. *Great Western United Corp.*, ____ U.S. ____, 99 S. Ct. 2710, 2718 (1979).

CONCLUSION

Illinois respectfully asks this Court to clearly delineate the constitutional choice of forum and choice of law mandates governing determination of this controversy. Illinois can bring an action against a citizen of another State either in Illinois courts or the Supreme Court. Since one count of the complaint was based on federal law, an alternative forum was the federal district court under 28 U.S.C. § 1331.

In any of these courts—Supreme Court, state court or federal district court—the Constitution demands that the law to be applied must be the law which is the source of the substantive right asserted. Where the source of the law is state law, state law must be applied; where the source of the law is federal law, federal law must be applied. Where as here one count of the complaint was based on federal law and two counts were based on state law, the courts must apply federal law to determine federal claims and state law to determine the outcome of the state claims.

Applying these principles to this case, the lower courts and this Court must apply federal law to the determination of the federal law claim and state law to the state law claims brought by Illinois. This is the unequivocal constitutional teaching of *Erie* v. *Tompkins, Guaranty Trust* v. *York* and *Ohio* v. *Wyandotte Chemicals.*

The interstitial federal common law articulated by this Court in *Illinois* v. *Milwaukee* does not conflict with the *Erie* mandate. While federal law—not state law—must necessarily determine the confines of the federal interstitial right, *Erie* mandates that state law—not federal law—must necessarily determine the confines of the state law rights. Federal "interstitial" common law—crafted by judges to fill in the gaps left by the federal statutory scheme consistent with the Congress' purpose—cannot oust (preempt) the concurrent application of state statute and common law unless Congress clearly expresses such an intent.

Congress, in addressing the problem of water pollution was clearly concerned about the establishment of a nation-wide minimum floor of technology-based effluent limitations. However, Congress clearly left to the States their long-held power to seek state law judicial remedies against pollution of their interstate territorial waters—regardless of whether that pollution was caused by a citizen of the aggrieved State or by a nonresident.

Viewed within this constitutional and statutory framework and the overwhelming evidence of liability, Milwaukee's thirteen years of procedural maneuvers to avoid its responsibility for pollution of Lake Michigan must come to an end. The District Court Judgment Order provides clear, enforceable substantive requirements with reasonable but firm deadlines. The Judgment Order is also consistent with the requirements of Wisconsin, Illinois and federal law, and also provides a flexible mechanism for modification, should lower cost alternatives be developed.

For all these reasons, Illinois asks that the Judgment of the District Court as affirmed by the Court of Appeals on the issues raised in No. 79-408 be affirmed by this Court and further that this Court deny all relief requested by said petitioners.

Respectfully submitted,

TYRONE C. FAHNER
Attorney General
State of Illinois

JOSEPH V. KARAGANIS
SANFORD R. GAIL
Special Assistant
Attorneys General
150 N. Wacker Drive
Chicago, Illinois 60606
(312) 782-1905

Of Counsel:
A. BRUCE WHITE
RUSSELL P. EGGERT
JEFFREY T. RENZ
150 N. Wacker Drive
Chicago, Illinois 60606
(312) 782-1905